No. 00-799

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
VOLUME II, PAGES 184 TO 306

MICHAEL L. KLEKNER*,
Deputy City Attorney
JAMES K. HAHN,
City Attorney
CLAUDIA MCGEE HENRY,
Senior Assistant
City Attorney
1800 City Hall East
200 N. Main Street
Los Angeles, California
90012
Telephone: (213) 485-5420
Counsel for Petitioner

JOHN H. WESTON*
G. RANDALL GARROU
WESTON, GARROU & DEWITT
12121 Wilshire Blvd.
Suite 900
Los Angeles, California
90025-1170
Telephone: (310) 442-0072
Counsel for Respondents

Counsel of Record

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OR CALL COLLECT (402) 342-2831

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JAMES K. HAHN,
City Attorney (SBN: 66073)
CLAUDIA McGEE HENRY,
Senior Assistant City Attorney
SHARON SIEDORF CARDENAS,
Assistant City Attorney (SBN: 60011)
P. NELSON KING,
Deputy City Attorney (SBN: 140113)
1700 City Hall East
200 North Main Street
Los Angeles, California 90012-4130
Telephone: (213) 485-9793
Attorneys for Defendant
CITY OF LOS ANGELES

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California corporation, and HIGHLAND BOOKS, INC., a California corporation, Plaintiffs, vs. CITY OF LOS ANGELES, a municipal corporation, Defendant.	) CASE NO. CV 95-7771 DDP (CTx)) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF LOS ANGELES' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES ON THE FIRST AND THIRD CAUSES OF ACTION; DECLARATIONS OF FRANKLIN P. EBERHARD AND P. NELSON KING AND EXHIBITS**) Date: August 25, 1997) Time: 10:00 a.m.) Place: Courtroom 24) (Filed Jun 30, 1997)

DECLARATION OF FRANKLIN P. EBERHARD

I, FRANKLIN P. EBERHARD, declare:

1. The facts set forth in this declaration are personally known to me. If called as a witness, I could and would competently testify thereto.

2. I am the Deputy Director, Department of City Planning for the City of Los Angeles. I have held that position for six years. My duties are to supervise the Office of Zoning Administration including the Zoning Administrator, Code Studies Unit, Deputy Advisory Agency, Environmental Section, and Public Counter. I also supervise the Citywide Planning Division. I am the Assistant General Manager of the Planning Department.

3. Before being appointed to my current position I held the following positions in the Department of City Planning: Chief Zoning Administrator, Senior City Planner, City Planning Associate and Planning Assistant.

4. During the time that I was the supervisor of the Code Studies section of the Department, the City Council instructed the Department of Planning, with the assistance of other City Departments to conduct a study on the effects of the concentration of adult businesses on the surrounding community. As part of that study we identified the various types of adult uses, using the various types of uses already regulated by the zoning code, i.e., retail uses and amusement uses. An example of an amusement type of use would be a "peep show," motion picture theater, or video arcade. An amusement use generally is a place of business devoted primarily or in some

substantial degree to providing on-site public entertainment.

5. The Los Angeles Municipal Code has historically regulated amusement enterprises separately from retail uses. Some examples of amusement enterprises include penny arcades, game arcades, video arcades, shooting galleries and the like. Amusement arcades are first permitted in the C2 Zone. They are not allowed in the CR, C1, C1.5, MR1, or MR2 Zones. These uses would be permitted by right, without discretionary land use review provided they were in the proper zone.

6. Bookstores are considered to be a retail use. A bookstore (new) is first permitted in the C1 Zone and used bookstores are first permitted in the C1.5 Zone. Bookstores are allowed in all of the commercial zones, except the CR Zone. In general, a retail use involves the provision of goods or commodities for use or consumption off-site.

7. The reason for treating amusement enterprises differently from bookstores is based on the historical experience of the City regarding the impacts associated with amusement uses. Those impacts are noise, hours of operation, parking and loitering.

8. There are other examples of uses in the zoning code, which although commonly thought of as symbiotic in nature, have in fact been considered separate uses and are therefore regulated differently. An example of this is automotive repair garages and automotive service stations. An automotive repair garage requires a 300-foot distance from residential uses, whereas a automotive service station does not.

9. In drafting the Adult Entertainment Zoning Ordinance it was reasonable to use the existing categories of uses contained in the Los Angeles Municipal Code, since the import of the ordinance was to further control the location of these uses. In my opinion it was reasonable to use the same categories of uses already regulated because the ordinance merely imposed additional restrictions on those uses based on the adverse secondary impacts when those uses were engaged in the provision of sexually-oriented materials.

10. In my many years in the Department of City Planning I have had the opportunity to study the effects of the provision of more than one type of business at a single location. It has been my experience that a location that only has one business does not have as many impacts on the surrounding community compared to a location with more than one business. As an example, the code has special regulations for "mini-malls." The reason for the regulations is that the concentration of a number of businesses at one site contributes to traffic problems, parking problems, litter, noise and other adverse impacts on the surrounding community.

11. Therefore, transferring this experience to the adult entertainment issue, it was reasonable for the City Council to conclude that the concentration of more than one adult entertainment business at one site would have more impacts than one business standing alone.

12. The City Council decided to use the dispersal method to mitigate the impacts caused by the concentration of adult entertainment businesses. The City has successfully used dispersal type ordinances to deal with

other land use problems. In the Westwood Village Specific Plan the ordinance requires the dispersal of fast food establishments. The City had identified land use impacts caused by the proliferation of fast food outlets. To combat these impacts the Westwood Specific Plan included spacing requirements. Another example can be found in the Citywide Sign regulations which require off-site signs to maintain a minimum distance from another off-site sign.

I declare under penalty of perjury and the laws of the state of California that the foregoing is true and correct.

Dated this [Illegible] day of April, 1997.

/s/ [Illegible]
FRANKLIN P. EBERHARD

FILM

AN INTER-

NATIONAL

HISTORY OF

THE MEDIUM

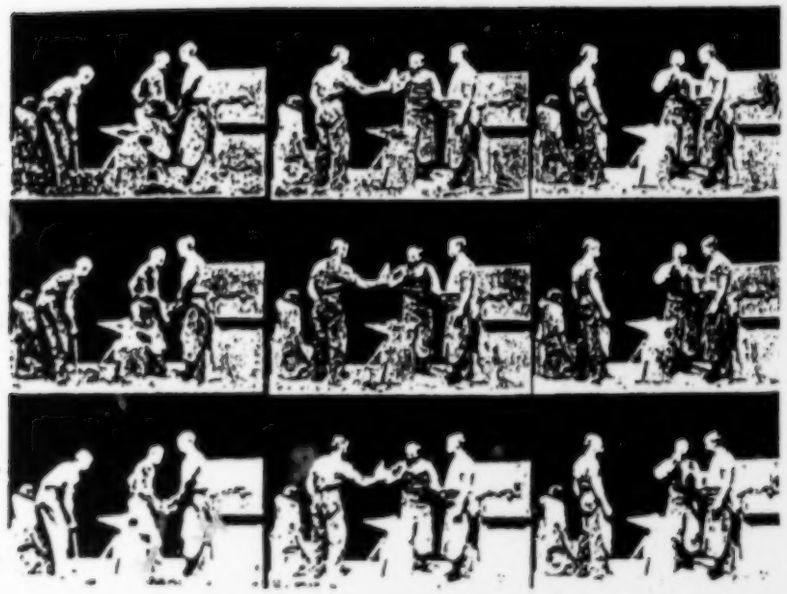
By Robert Sklar

Harry N. Abrams, Inc., Publishers

* * *

design for recording movement on film that has lasted with little change for one hundred years (though the electronic recording of images by video camera, is, of course, fundamentally different).

The Black Maria. Further improvements in the apparatus led to public exhibitions in 1893 and the opening of commercial viewing parlors in 1894 in the United States, France, and England. To foster the commercial development of his devices, Edison also constructed a studio on his laboratory grounds. This was a shed-like structure built on a turntable to follow the sun, with a roof that opened to let in sunlight, and walls of black tar paper. The staff called it "the Black Maria" because they thought it resembled the police patrol wagons of the era, which went by that nickname. In early 1894 vaudeville performers came over from New York to record their acts for Edison's camera. With film rolls 50 feet in length, these films lasted about twenty seconds, a single shot from a stationary position, without editing or camera movement. At the same time Edison's company was manufacturing the Kinetoscope viewing machines. These were box structures containing a motor-and-shutter mechanism much like the camera's that ran a loop of positive film past an electric light source. The spectator peered through a small window to see the image. Originally the machines could only accommodate, like the cameras, 50 feet (or twenty seconds) of film, but within a few months some were modified to hold 150 feet of film, about a minute of screen time. Edison made deals with several firms to sell them both Kinetoscopes and films to show in them. A Kinetoscope parlor opened in New York in April 1894.



Left: 1.23. Frames from Blacksmith Scene, *shot in the Black Maria in early 1893. This film was featured at the first public exhibition of Edison's Kinetograph camera and Kinetoscope viewer on May 9, 1893. Using a magic lantern, individual frames were projected before an audience of several hundred; then people lined up to view the complete film in the Kinetoscope, one at a time. This event has led early-cinema historian Charles Musser to call* Blacksmith Scene *"the first commercial-length modern motion-picture subject to the publicly exhibited."*

Edison and Dickson had apparently given little attention to the possibility of projecting their images. They continued to operate from the example of the phonograph, which had successfully been marketed in public commercial spaces with instruments for individual listening. The long tradition of magic lantern screen entertainment, however, with large-sized images projected before large-sized audiences, suggested both the technical and economic inferiority of the Kinetoscope "peep shows." Edison's achievement only spurred others to surpass him

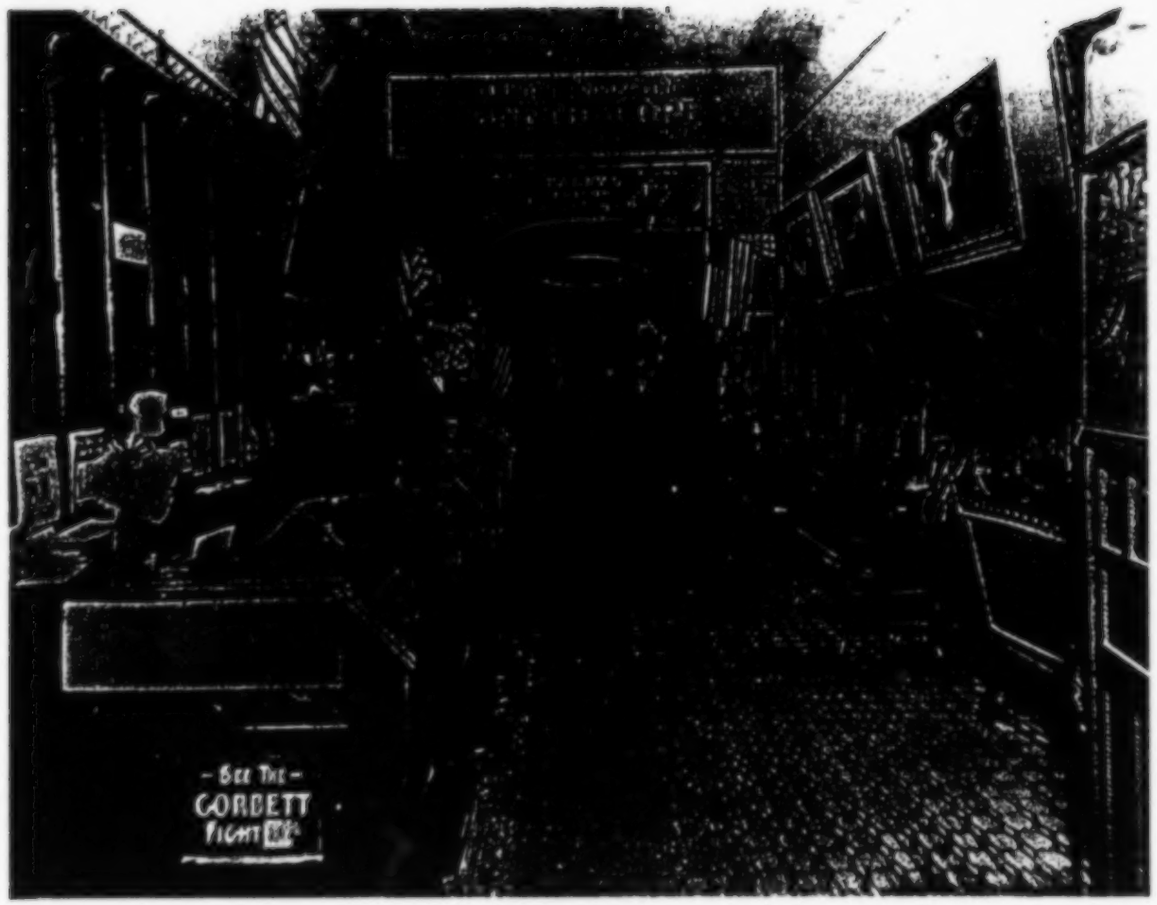
by inventing a motion picture projector. Dickson joined the effort when he left Edison's company in April 1895.

Below: 1.24. The Lumière Cinématographe camera depicted on a catalogue cover, 1897; when linked with a magic lantern lamp and lens, this apparatus functioned as a projector.

PROJECTED FILMS

By that time, however, the first projected motion pictures had already been demonstrated in France. The inventors were the brothers Auguste and Louis Lumiére (1862-1954; 1864-1948), who ran in Lyons an important firm for manufacturing photographic equipment. Knowing of Edison's

work, they sought to compete with an apparatus of their own. What they came up with in early 1895 was a device whose versatility surpassed any previous invention. Called the Cinématographe, it was a light-weight, hand-cranked machine that advanced the film roll through a claw mechanism. They found that it not only could operate as a camera but could be used to throw large-sized images onto a screen when it was linked with projecting equipment familiar from magic lantern shows. With their Cinématographe, they shot films and projected them for select groups repeatedly during 1895. At



Left: 1.25. Tally's Edison Phonograph and Kinetoscope Parlor, the first motion picture exhibition space in Los Angeles, in 1896. In July of that year the proprietor Thomas L. Tally (shown at left) began offering "mammoth" projected images as well as peep-show viewers and audio headsets for phonograph recordings; the sign identifies the new apparatus as "projecting Kinetoscope" rather than its official name, Vitascope.

the Congrés des Sociétés Françaises de Photographie in June 1895 they filmed the delegates getting off a boat and projected the film for its subjects the following day. The premiere of projected motion pictures for the general public came on December 28, 1895, in Paris.

Below: 1.26. Just before the April 1896 Vitascope debut, the Edison company shot one of its most popular films for the new projector, The May Irwin Kiss, *depicting performers May Irwin and John Rice reenacting a climactic scene from their theatrical hit,* The Widow Jones.

Inventors in Germany, England, and the United States were on their heels. In Berlin, another pair of brothers, Emil and Max Skladanowsky (1859-1945; 1863-1939), projected films with their Bioscop apparatus,

which featured two film strips whose frames were alternately exposed, in November 1895. In London, the Kineopticon projector of Birt Acres (1854-1918) showed films in January 1896; it was based on a camera that Acres had earlier developed with Robert W. Paul (1869-1943), which in turn derived from Marey's chronophotographic camera (Acres went on to devise in 1899 a low-cost camera, the Birtac, for nonprofessional use – what would later be called "home movies"). The first American projector was developed by Charles Francis Jenkins (1867-1934) and Thomas Armat (1866-1948), later by Armat alone in a commercial arrangement with Edison. The projector, the Vitascope, which used sprocket wheels to advance the film, was marketed as an Edison product and made its debut on April 23, 1896, at Koster & Bial's Music Hall in New York.

THE ADVENT OF MOTION PICTURES

Before considering more closely the films exhibited at these early screenings, we should step back for a moment to reflect once more on our subject: the emergence of motion pictures at the end of the nineteenth century. From our later position in historical time, we may say that we are observing an awesome moment launching a phenomenon that changed the world. But *why* did

* * *

these newcomers came from agricultural regions and were new to factory work and city life. Too poorly paid to afford vaudeville prices and working such long hours that they had little time for amusements at all, this population proved a fertile opportunity for entrepreneurs, themselves often immigrants, who found a way to offer them inexpensive popular entertainment – the five-cent movie theater, or nickelodeon. It is no coincident that these theaters first made an impact in such heavily industrialized centers of immigrant settlement as Pittsburgh and Chicago...Within a couple of years there were many hundreds of nickelodeons across the United States.

This expansion of exhibition generated enormous profits – at first for the exhibitors more than the producers. It occurred several years before Pathé led the switch from selling to renting films, so in the beginning of the nickelodeon boom producers received only their original price for a print, regardless of how many times the print was screened and how many people saw it. Once the rental system began, payment varied according to length of time, number of screenings, audience size, and box office receipts (and the exhibitor's honesty in reporting these figures). Renting films necessitated setting up a new tier of organization, the film exchange, which handled distribution of prints to exhibitors. A new level of complexity entered the industry: with higher profits came a demand for increased production, an elaborate system to control prints, and, for the first time, critical feedback from audiences, exhibitors, the expanding entertainment trade press, and concerned social and cultural organizations.

2.25 The five-center theater, beginning around 1905, made movies part of everyday life for immigrant and working-class Americans. When storefront operations were photographed, owners and employees often posed at the door, as at the World's Dream Theatre in St. Louis, Missouri.

Movies and Society

This critical feedback from different groups marked the emergence of a distinct public sphere for motion pictures. The medium's quality – and deficiencies – now became a focus for public debate. Social organizations concentrated on the moral issues, while for critics, exhibitors, and audiences the concerns were more on the aesthetic side. The nickelodeons were magnets for young people, families, and even mothers with babies, as evidenced by photos of nickel theaters with baby carriages parked outside. Those concerned for the morals of such audiences criticized the elements of violence and sexual titillation on which the cinema of spectacle often relied. Those

concerned with aesthetics criticized primitive cinema for its frequent incomprehensibility. Reliance on audience familiarity with the story grew more untenable as patrons came from increasingly varied cultural backgrounds and training. Production companies expanded the plot synopses they supplied to exhibitors (to promote rentals, and also as background information for lecturers), but these sometimes contained so much more narrative information than did the screen images that they proved the critics' point.

There were complaints centering on the theaters themselves for which the producers did not bear direct responsibility. These concerned hygiene, lighting, safety, and the broader question of whether children should be exposed to alluring impressions outside the bounds of the official school and church cultures. Some wanted the movies controlled out of censoriousness, others out of a desire to uplift the medium's environment and cultural values.

Motion Picture Patents Company

Where control was an issue, Thomas Edison would eventually be sure to have his say. As the motion picture industry transformed itself, Edison had continued to pursue his legal cases. After 1907, with the shift from selling to renting films, he had a new card to play: he could put pressure on the new distribution firms, or film exchanges, to handle only films produced by companies that paid him royalties for using his patents. The overall strategy, as it had been for a decade, was to control the motion

picture industry, but under the new industrial circumstances it would serve additional purposes. Only a select group of theaters that charged higher

* * *

2.26 Moralists' concerns about unseemly behavior in nickelodeons were countered by lantern slide advice.

REVISED
EDITION

THE MOVIES

BY
RICHARD GRIFFITH
AND
ARTHUR MAYER

with the assistance of
EILEEN BOWSER

SIMON AND SCHUSTER, NEW YORK

Thomas Alva Edison

THE BIRTH OF THE MOVIES

WHITE MAGIC

The nineteenth century was rushing toward its close, propelled by steam and electricity. The railroad, the steamship, the telegraph, the telephone, the phonograph, and the internal combustion engine took their places in human life in bewildering succession, but the American people never tired of exclaiming, "What hath God wrought?" even though they were more inclined to attribute most of these marvels to Thomas A. Edison. The barbarous human past was dead, and with it all superstitious beliefs and forebodings. "White Magic," the miracle of science was called in the 1890s, and it was to be the successor to those dark, abandoned superstitions. It led straight to Utopia, everybody agreed, and no one mentioned Pandora and her box.

Edison himself, the high priest of the new gospel, had invented the phonograph in 1876 and shortly thereafter began to try to contrive its visual equivalent. By 1889, he and George Eastman had perfected the frame-lined celluloid strip which set pictures in motion. Having solved the basic problem, he had little interest in going further. He regarded the invention as a toy and did not respond to the urging of his associates that he try to find a way of projecting these one-inch film images from the confines of a small box onto a screen large enough to be looked at by a theater audience. But, always the practical man, he made his invention available to the first outlet

which appeared. Beginning in 1892, "moving pictures" could be seen in places originally called Penny Arcades or Peep Shows, which soon became known as Kinetoscope Parlors.

The Kinetoscope Arcade, San Francisco, *c.* 1899. Penny arcades for a while also featured "Kinetophones" which enabled the spectator to hear music or "sound effects."

THE KINETOSCOPE

Penny arcades were for the poor and the young. They were storerooms with wide entrances decked with circus posters and lurid stills, forerunners of the garish movie advertising of later years. Phonographs had been installed in them early, and now sound and picture were crudely harnessed together to provide such naïvely comic or pornographic bits of life as "What the Bootblack Saw" or "How Bridget Served the Salad Undressed." (A trend manifested itself from the beginning: the risqué and slapstick were immediately popular, while "Surf at Dover" or "Beavers at Play" brought in meager returns.) To see these scraps of film, you dropped a penny in a slot, looked into an aperture like that of a stereoscope, and ground a crank. A light flashed on, and for a minute you watched Fatima wiggle her torso or a small boy squirt the garden hose on a well-dressed gentleman. You can see them today, in the flea circuses of the world, and now they are disarmingly redolent of an age of innocence. Then, they were glimpses of a far *less* innocent world than the poor and the young knew from their own experience.

The Kinetoscope was as far as Edison considered it expedient to take his new invention. Pleased with the flood of pennies that flowed in ~~from the peep~~ show parlors, he feared that if he were to project his images so that more than one person could see them at a time, the audience would soon be exhausted. But the pull of "living pictures" magnetized a host of would-be Edisons here and abroad. By 1895, the Kinetoscope had a lively imitative competitor in the Mutoscope, and strenuous efforts were being made by a score of mechanically minded men to combine the Kinetoscope principle with that of the magic lantern, so as to throw a larger-than-life-size picture on a sheet or on some other white surface.

Had any of the owners of the motion picture trust walked past the Crystal Hall on Fourteenth Street one day in 1914, they would have been confirmed in their contempt for the commodity they produced. The theater's poster artist had transformed – probably in all innocence – the Italian import *Tigress* to *Tigress, The Mysterious Criminal*.

THE NICKELODEON AND ITS PATRONS

In contrast to the small-town store shows, nickelodeons in New York and other big cities grew out of penny arcades in many cases, and they looked as dark, dirty, and smelly as penny arcades and flea circuses look to us today. Their first patrons were often tramps and drunks; the respectable shuddered away from them and murmured against them. It began to be said that something ought to be done about policing them or maybe banning them altogether. But the city nickelodeons thrived. Even more than in rural America, they were the only entertainment available to the poor.

Especially were they the chief entertainment of the hordes of immigrants from southern and eastern Europe who poured into the metropolis in the early 1900s. Barred from the theater by their ignorance of English, they could follow the one-reel picture dramas of the nickelodeons, learning much about American life and values in the process, and piecing out their English as they gradually related the subtitles to the action. Observing this, some of the more farsighted social workers of the period began to think that the despised "poor man's show" might become his university as well.

By the end of the Nickelodeon Age, even the city nickelodeons were safe and comfortable places which the most fastidious might (and some surreptitiously did) attend without offense. Exhibitors began to clamor for longer films with better stories and acting, knowing that audiences would pay more if they got more, but their clamor went unheeded. The real powers of the new industry, the producers, refused to believe that anybody

would ever shell out more than a nickel to see a movie. They didn't think the pictures they made were worth even a plugged one.

The New York Times ENCYCLOPEDIA OF FILM

Gene Brown, Editor

Harry M. Geduld, Advisory Editor

NYT
TIMES
BOOKS

* * *

BOSLEY CROWTHER, film critic of The New York Times, is the author of a forthcoming book that examines the origins of the movies.

[Ads Omitted In Printing]

ONWARD AND UPWARD – From its lowly beginning in a store, the 5-cent movie house progressed to this "high class" establishment on lower Third Avenue, which boasted "practically a two-hour show."

BEST AVAILABLE COPY

WHEN MOVIES WERE VERY YOUNG

Fifty years ago nickelodeons came into vogue, offering fifteen minutes of film for five cents.

By BOSLEY CROWTHER

THE glory, if such you can call it, of the old-time nickelodeon theatres – once as rampant in the realm of entertainment as television is today – will be fondly re-called and celebrated in ceremonies today. The occasion is the fiftieth anniversary of what legend holds to have been the opening of the first five-cent movie in Pittsburgh, Pa.

The "theatre" which inspired this celebration was actually a vacant store which two prominent Pittsburgh theatre owners, State Senator John P. Harris and Harry Davis, his brother-in-law, converted into a novel emporium where early silent movies were shown on a fifteen-minute rotating schedule at a nickel the customer.

This odd little place of entertainment, located at 433 Smithfield Street, next door to a penny arcade, was called the Nickelodeon, and was no more than a long, bare storeroom equipped with ninety-six folding chairs. An old phonograph played tinny music. The screen was a white linen sheet. And the films were such things as "The Baffled Burglar" and "Poor but Honest," which ran no more than a few minutes each.

This was the curious venture which legend holds to have been the first exclusively motion-picture theatre and the model of all the nickelodeons.

Legend is slightly inaccurate, as legend frequently is. Motion pictures were shown in tents and backrooms, in public halls and amusement parks, as independent entertainments, long before the opening of the Pittsburgh store. Old "Pop" Rock, one of the founders of Vitagraph, had a little nickel movie show that he operated down in New Orleans as early as 1896. And Tom Talley opened his first Electric Theatre, in which programs of primitive movies were shown, as an adjunct to a Los Angeles dime-museum as early as 1902. But the Pittsburgh venture of Harris and Davis came on the threshold of a great new trend. And it gave a name to the whole generic group of converted-store "theatres."

THIS sudden emergence of many nickelodeons, beginning in 1905, was a phenomenon in the world of entertainment that marked the real beginning of the "motion picture age." The primitive "flickers," derived from the inventions of the Lathams, Edison and the Lumieres, had been familiar for almost a decade as items on vaudeville-theatre bills. Here they had become so monotonous, after the first flush of their novelty, that they were regularly used to chase customers out of the theatres at the end of the shows.

Then a series of circumstances which began developing around 1905 brought on the wave of cheap showplaces that proved the movies to be the choice of the masses.

First, the discovery of the medium as a dramatic storytelling device with such crude but effective little dramas as "The Great Train Robbery," made in 1903, opened the way for the wooing of a new class of naïve

customers whose emotions were easily stimulated and whose pocketbooks were congenial to the 5-cent price.

Second, the great wave of immigration which hit this country from 1900 to 1910 was dumping into the cities fresh pools of potential customers for the brisk little picture dramas that required no language to be understood.

Third, the popular interest rose in a type of movie presentation called "scenic tours," which was nothing more than the showing of travel pictures in a place got up to look like a railroad car.

By 1907, it was calculated that there were between 2,500 and 3,000 nickelodeans in the United States, with the number increasing yearly. The "ingredients" needed for operation such as showplace, according to a trade paper, Motion Picture World, were "200-500 people (audience), phonograph (with extra large horn), woman cashier, electric sign, machine and operator and films, canvas screen, piano, barker, chairs." It was further remarked that the owner "needs a few brains and a little tact."

Immediately the popularity of the nickelodeans became apparent, various small business enterprisers and opportunists rushed into the field. Among them were such moving spirits as Adolph Zukor, William Fox and Marcus Loew, who were later to become great figures in the vastly expanding motion-picture industry.

Inevitably the guardians of the public weal came to view with alarm these upstart emporia. Within a couple of years of their emergence, religious and social leaders

were crying out against the perilous and corruptive influences of the nickelodeons.

The physically hazardous nature of many of these "store theatres," which were crammed into all sorts of buildings that were never designed for such things, increased their liability to charges. Occasional projection-machine fires and consequent stampedes of customers to get out of the crowded rooms caused periodic disasters, usually with fatalities. Cities soon invoked fire laws against them and compelled conformance to rules.

As a consequence of the angry question of the moral character of the pictures shown, the Peoples Institute in New York City was designated to inspect all the items made for the nickelodeons with an eye to stopping those thought morally harmful. Thus was established the precedent for the censoring of films.

The era of the nickelodeons lasted for roughly ten years. In that time, their vogue had penetrated to virtually every town in the United States. New York City had close to 700 5- and 10-cent movie places in 1908, which was the year in which Mayor George B. McClellan attempted to crack down on them.

But the slow passing of the nickelodeons was not entirely due to the objections of the moralists and the operation of fire and health laws. It was the consequence of the improvement in motion pictures, the increase in their length and costs and the ultimate necessity of larger and better theatres in which to seat a greater number of customers.

With the advent of the four and five-reel picture after 1912, the doom of the storefront theatre was sealed. Already the more advanced exhibitors, such as Loew and Fox, were picking up neighborhood legitimate theatres and old "family burlesque" houses in which to show films and vaudeville. The more elaborate motion pictures, such as Sarah Bernhardt's "Queen Elizabeth" and the Italian "Quo Vadis?", were opened in legitimate theatres on Broadway. The movies were becoming refined.

To be sure, nickelodeons lingered in certain spots for many years. But the expansion of the motion picture had made obsolete its original and novel homes.

• June 19, 1955

The New York Times ENCYCLOPEDIA OF FILM

Gene Brown, Editor

Harry M. Geduld, Advisory Editor

[LOGO]
Times
BOOKS

RETURN OF THE PEEP SHOW

HOLLYWOOD

The efforts of the cinema to be recognized as a member of the aristocracy apparently have been in vain. In recent weeks mechanical developments have occurred that threaten to throw the medium back to its nickelodeon source. The most feverish activity in Hollywood at the moment centers in the nickel-in-the-slot picture machines for bars and pool rooms. It looks as though the

foundation laid by "The Birth of a Nation" and "Gone With the Wind" is crumbling.

At least a half-dozen concerns are preparing devices to wheedle nickels out of saloon patrons. James Roosevelt was the first to announce his interest in the new business when he revealed his association with the Mills Novelty Company of Chicago. This week Phonovision made its appearance, sponsored by Frank Orsatti, head of one of Hollywood's more formidable talent agencies; Sam Sax, formerly of Warners, and Sollie Freedman. The report is that the concern has Warner and Metro money in it. Four other firms are known to be in the process of organization, the latest to come into the open being Phonofilm, which is credited with having the backing of Bell & Howell, the camera manufacturers.

Those promoting the devices, which will play music and show motion pictures at the same time, anticipate fantastic profits from the machines. There are an estimated half-million phonographs operating on the serve-yourself basis in bars, lunch rooms and pool halls in the United States. The movie people expect to displace most of them because they give so much more for the money. Imagine being able to see Benny Goodman as well as hear him! It's practically unbelievable. The promise of profits is so great that vast sales organizations are being formed to sweep across America and place the devices in every drinking emporium in the land. With their success, that day can be envisioned when an inebriate, under great emotional stress, will sob on the barkeep's shoulder, "But I don't want Hedy Lamarr; I want a beer."

The slot-machine films have caused Roosevelt to revise his production plans. His Globe company will be devoted to making 16 mm. subjects for the automatic devices, while his feature activities will be merged with those of Samuel Bronston Productions, of which Bronston is president and Roosevelt is chairman of the board. Their first offering will be "The Bat." This merger of two concerns which have not yet entered production will give Roosevelt added capital and Bronston a United Artists release which he did not have.

When Roosevelt's connection with the slot-machine business was first announced he was to be a partner in the Mills venture as well as producer of the pictures. Now he has withdrawn from the mechanical division and will limit his activities to picture making.

While production of the projectors has not yet reached a commercial basis, a few are in operation in Hollywood cocktail lounges, and the Orsatti Company has a number of its Phonovisions on display in its offices. They are huge and gaudy devices, with plastic cases through which colored lights blaze when they are not in operation. The shells resemble vast gramaphones with the projection machine at the base shooting into a mirror on the rear panel. By a series of reflectors the image is carried to the top of the machine, where it has been enlarged to fit a screen approximately twelve by eighteen inches. The film is on a continuous loop which is taken off a loosely wound reel and replaced after it has been projected.

There are ten subjects to the reel, each subject lasting three minutes. With the machine in continuous operation

this permits a maximum revenue of $1 an hour. The makers estimate that the film costs 1½ cents a foot to manufacture and distribute. In speculating on the entertainment possibilities of the device, Freedman says that the machine can be located in such a way that through mirrors set about a barroom the image may be visible in every booth.

* * *

Whether the Hays Purity Code will be invoked is a moot point. One subject now on display in a Hollywood bar deals with a strip tease number and it is unlikely that this would be given the Hays propriety seal. Such a subject, however, has great revenue-producing possibilities, for, placed in the middle of a reel, it is necessary to fill the machine with nickels again before the lady's performance can be witnessed a second time.

D. W. C.

• April 21, 1940B

[Ads Omitted In Printing]

The New York Times
ENCYCLOPEDIA OF
FILM

Gene Brown, Editor

Harry M. Geduld, Advisory Editor

NYT
Times
BOOKS

May 1941

* * *

[Ad Omitted In Printing]

THE HOLLYWOOD ROUND-UP

By DOUGLAS W. CHURCHILL

HOLLYWOOD

* * *

Although the anticipated boom in nickle-in-the-slot movies failed to materialize, the business is developing, albeit slowly, and this week a new concern, Etienna Noir Productions, displayed its wares. This latest contribution consists of a two-color job under the title of Majorettes and they tell more of a story in the three minutes they are on display than any of the others. From a production standpoint, Noir says, he has had advantage for he shoots directly on 16-mm. film while James Roosevelt and the others use 35-mm. and reduce it.

While every one is vague about actual figures, it is probable that there are 1,500 machines in operation in America today. It was predicted when the devices were

launched that by this time the number would be many thousands. They are made by a half dozen firms. Lack of product rather than a shortage of projection machines is given as the reason for retarded development of the field.

The cost of the juke box movies runs from $1,000 a subject for Majorettes to $2,300 for the Roosevelt offerings. A reel of eight subjects rents for approximately $50 for six weeks, which is as long a run as can be expected. There have been no smash hits yet in the slotties, although one subject, "The Man Who Comes Around," has shown above average popularity in some districts; it's sort of off color. Taxes have been levied on the machines where ever they have shown popularity, with New York exacting the highest, $2 a month a box.

• May 18, 1941

[Proof Of Service Omitted In Printing]

G. RANDALL GARROU
California State Bar No. 74442
MELANIE D. LONG
California State Bar No. 173821
WESTON, GARROU & DeWITT
12121 Wilshire Blvd.
Suite 900
Los Angeles, CA 90025-1176
(310) 442-0072
(fax) (310) 442-0899

Attorneys for plaintiffs

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; *et al.*, plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, defendant.	Case No. CV 95-7771 DDP (CTx) **DECLARATION OF STEVEN D. WIENER IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** Hearing: Date: August 25, 1997 Time: 10:00 a.m. Ctrm: 24

DECLARATION OF STEVEN D. WIENER

(28 U.S.C. § 1746)

I, Steven D. Wiener, hereby declare as follows:

1. I am, and at all times have been, the president of plaintiff Highland Books, Inc., and also of plaintiff Alameda Books, Inc. I make this declaration in support of

those plaintiffs' Motions for Summary Judgment. Except to the extent stated otherwise, I have personal knowledge of all statements made herein.

2. Plaintiff ALAMEDA BOOKS, INC., is a corporation, organized and existing under the laws of the State of California. It owns and operates an "adult" book and video store by the name of "Alameda Books", Unit 101, located at 1901 S. Alameda, in the City of Los Angeles, Los Angeles County, California. Alameda Books is not located within 1,000 feet of any adult entertainment business nor within 500 feet of any religious institution, school, public park, nor any agricultural or residential zone. It is also located in a proper zoning district in the City of Los Angeles for that type of use.

3. Plaintiff HIGHLAND BOOKS, INC., is a corporation, organized and existing under the laws of the State of California. It owns and operates an "adult" book and video store by the name of "Highland Books", located at 6775 Santa Monica Blvd., in the City of Los Angeles, Los Angeles County, California. Highland Books is not located within 1,000 feet of any adult entertainment business nor within 500 feet of any religious institution, school, public park, nor any agricultural or residential zone. It is located in a proper zoning district in the City of Los Angeles for that type of use.

Unitary Nature of Stores

4. Both Highland Books and Alameda Books are relatively small retail stores. The area of the portion of Alameda Books which is open to the general public is approximately 3,000 square feet. The area of the portion

of Highland Books which is open to the public is approximately 2,500 square feet.

5. Both stores sell non-obscene sexually-oriented books, magazines, videotapes and sexual accessories and novelties. Additionally, both stores rent all of the videotapes otherwise on sale at each store.

6. Within both stores, there are also a number of booths, described in more detail later herein, wherein a customer can view sexually-oriented videotapes.

7. The method of operation of the two stores is virtually identical. During most of the hours while the store is open, there is but a single employee in the store, a counter clerk who rings up retail sales and supervises operation of the store's video viewing booths. That employee also gives change and checks identification to ensure that no minors gain access to sexually-oriented materials. At certain times of the day, each store will also have a person on clean up detail who also acts in the capacity of a security guard.

8. Both Highland Books and Alameda Books are unitary businesses in every relevant sense of the word. The video viewing booths and retail sales occur in the same commercial space within a single building. In Alameda Books, there are no walls separating the video viewing booths from the retail portion of the premises. In Highland Books, the video booths are in the same store as the retail sales, but in a somewhat separated portion of the store connected to the retail sales by a common and open interior entrance way. In both stores, one manager (or clerk) supervises the entire location. There is only one entrance/exit door (not counting any emergency exits) to

the entire store. Customers must go through this main entrance to get to either the video booths or the retail sales areas of the store. Customers may freely walk about the premises entering and exiting the video viewing booths and browsing through the store.

9. Both Highland Books, Inc. and Alameda Books, Inc., are the sole owners of each respective business in question, including both the retail sales and rental aspects of the stores as well as the video arcade portion of the store. The income from these stores' retail sales and from their video viewing booths all goes exclusively to their corporate owner and is not distinguished in any way other than for internal accounting purposes. In every standard commercial sense, both Highland Books and Alameda Books are but a single business each, notwithstanding the fact that the City of Los Angeles ("the City"), by ordinance, has chosen to artificially define their businesses as each constituting more than one adult entertainment "business."

10. The City has threatened both Highland Books and Alameda Books with enforcement of the criminal provisions of L.A.M.C. § 12.70C which prohibit operating more than one adult entertainment "business" within the same building or business. Specifically, on March 15, 1995, a City building inspector issued Order to Comply No. 06864 to Alameda Books, Inc., in care of its attorney, Norman Atkins, stating that it was violating the portion of L.A.M.C. § 12.70C prohibiting the operation of more than one adult entertainment business in the same building. A true copy of that order is attached hereto as Exhibit A. I am further informed that the City thereafter decided to initiate a criminal prosecution against

Alameda Books for that same violation but that it had failed to file such lawsuit prior to the issuance of a preliminary injunction in the present federal action. Because of those threats, both Highland Books, Inc. and Alameda Books, Inc. concluded, to their great surprise, that notwithstanding the City's settlement with numerous adult businesses in the *Topanga Press* litigation, it had decided to prospectively resume enforcement of this same multiple use prohibition against *other* adult businesses. For that reason, both plaintiffs herein reasonably feared criminal prosecutions and joined as plaintiffs in the present lawsuit.

FIRST AMENDMENT ISSUES

Nature of "Arcade" Use

11. Alameda Books has 12 multi-channel video viewing booths. It also has three video preview booths. Highland Books has sixteen multi-channel video booths and three video preview booths.

12. In both stores, each multi-channel video booth provides the customer with an average of 60 different channels of videos which may be viewed if the customer places a dollar bill into the machine. The customer may then browse from channel to channel until a timer terminates the operation of the machine. After a customer has watched the videos of his or her choice in the multi-channel video booths, the customer can then go to the clerk on duty and purchase any of the videos showing in the multi-channel booths. In this way, customers can

browse a wide variety of videos in a relatively inexpensive manner and then make their selections concerning which videotapes to ultimately rent or purchase.

13. The video preview booths work more directly in conjunction with the retail video tape sales and rentals portion of the store. In Alameda Books, the store carries approximately 6,500 different sexually oriented videotapes for rental or retail sale. At Highland Books, the store also carries approximately 6,500 different sexually oriented videotapes for rental or retail sale. Both stores utilize video preview booths in a similar manner. Specifically, if a customer should happen to see a videotape on one of our shelves that may be of particular interest, but which is not available for viewing on one of the 60 different channels in the multi-channel video booths, that customer can then bring the videotape directly to the counter clerk and request to preview that specifically chosen videotape. After paying a small fee to the counter clerk, the customer is then directed to one of the video preview booths where the clerk activates the necessary machinery to allow the customer to view that videotape. Following the viewing of the tape in the preview booth, the customer may, and frequently does, elect to either purchase or rent such tape for subsequent home viewing.

14. At all relevant times, there has existed in both Highland Books and Alameda Books a prominently displayed commercial sign which, in pertinent part, states the following to all customers:

> "ALL VIDEOS IN THIS STORE ARE AVAILABLE FOR RENT, PREVIEW, AND/OR SALE. A CASH, VISA OR MASTERCARD DEPOSIT

> EQUAL TO THE PRICE OF THE VIDEO IS REQUIRED."

15. It is ā regular occurrence in both Highland Books and Alameda Books that customers who have viewed a videotape either in one of the multi-channel video viewing booths or in one of the video preview booths will, before leaving the store, proceed to either rent or purchase one of the videos that they have just previewed.

16. It is my understanding that the operation of *either* video preview booths *or* dedicated multi-channel video viewing booths would both, independently, cause a store to be characterized as an "adult arcade" within the meaning of the definitional sections of Los Angeles's adult entertainment zoning ordinance. Moreover, to the extent that any store containing either multi-channel video viewing booths or video preview booths would also offer to sell or rent such adult videotapes to their customers, such a store would also be characterized by the City as an "adult bookstore." Accordingly, if this ordinance is upheld, then there would be nowhere in Los Angeles where one could establish an adult bookstore and allow its customers the option of previewing a sexually-oriented videotape before deciding to rent or purchase it.

17. I have been involved in the management of adult bookstores for at least 15 years. In the many years in which I have been involved in this industry, I have never heard of a business which maintained or operated motion picture or video viewing booths as a primary use except in conjunction with retail sales of related media

materials, such as adult books, magazines, films or videotapes. Adult arcades have existed as primary uses, if at all, within adult bookstores as a single business under one roof. Moreover, I am familiar with the adult bookstore industry not only within Los Angeles County, but also within the entirety of California and the nation as a whole. It is my experience that throughout the entire country, there is no such thing as an "adult arcade" which exists as either an independent business or a primary use unrelated to any retail sales of adult materials. In short, there simply *is* no such thing as an "adult arcade business" which exists in the real world independent of that which the City defines as an "adult bookstore."

18. Based upon my many years of managing the operation of adult bookstore businesses, I have also developed substantial expertise in understanding the economics of this type of business. It is my opinion that an adult bookstore has a significantly greater chance of succeeding and remaining in operation if, as a part of its business, it operates an adult arcade. Similarly, it is my opinion that an adult arcade has a significantly greater chance of succeeding and remaining in operation if such business operates within an adult bookstore. In making these statements, it is my intent neither to endorse nor reject the entirely separate proposition of whether either such business *could* in fact theoretically survive except as operated in tandem with the other. I have been informed by my lawyers that this latter issue, by prior agreement with the City, is one upon which we will not present evidence.

19. In sum, it is my opinion that if the City is allowed to enforce its prohibition on so called "multiple

use" adult businesses, the public will be deprived of any opportunity to view or preview sexually-oriented videotapes prior to the purchase or rental of such videotapes. It is my belief that this would deprive the public of significant and valuable information rights which it presently both enjoys and exercises.

Secondary Effects

20. As one who has observed and been involved in the operations and management of adult bookstores for 15 years, I am aware of no legitimate interests the City could possibly have in preventing adult arcades from operating in conjunction with retail sales or rentals of video tapes in the same commercial space, given the extensive restrictions that already apply to such businesses. Such restrictions include not only special lighting requirements and requirements that there be no doors on the viewing booths (so as to insure the visibility of the patron using the booth), but also special zoning restrictions which require that adult arcades (as well as adult bookstores) be in proper zones, and also be at least 1,000 feet from any other adult business (as defined by the City's Municipal Code) and at least 500 feet away from any religious institutions, schools, public parks or residential zones. It is my belief that the existing restrictions on adult arcades and adult bookstores are more than sufficient to accomplish any conceivably legitimate municipal interests. I cannot imagine what further municipal purpose would be served by prohibiting properly zoned adult arcades from operating from within a properly zoned adult bookstore. The only conceivable purpose

would appear to be the attempted destruction of the adult arcade industry.

EQUAL PROTECTION ISSUES

21. Both Alameda Books and Highland Books commenced operating (i.e. first opened their doors to the public) at some time *after* January 23, 1984, the effective date of Los Angeles Ordinance No. 158,579. To the extent that ordinance may apply to the operation of these businesses, it is my understanding that these businesses have no statutory grandfather status under that ordinance.

22. I am now and at all times have been president of Beverly Books, Inc., the owner and operator of Le Sex Shoppe. Moreover, subsequent to January 23, 1984, I purchased controlling shares in both Whitey, Inc., and Hardrock, Inc., the respective owners and operators of Big Apple Bookstore and J&B Books and, at all times since I took over such controlling interest, I have been the President of both of those corporations.

23. As discussed in more detail below, Beverly Books, Inc., Whitey, Inc. and Hardrock, Inc. were plaintiffs in a lawsuit against the City of Los Angeles challenging, among other things, the constitutionality of the City's ordinance prohibiting multiple adult uses in the same building. That lawsuit was filed under the name *New Wave, Inc., et al. v. City of Los Angeles*, U.S.D.C. C.D.Cal No. CV 91-0689 and was one of the seven cases consolidated in the *Topanga Press* litigation.

24. After District Judge Gadbois had issued a preliminary injunction preventing the City from enforcing,

among other things, that particular ordinance, the case ultimately was settled in a settlement agreement pursuant to which the City agreed that it would permanently cease enforcing, among other things, the multiple use prohibition of L.A.M.C. § 12.70C against these three businesses in return for their agreement to drop the merits of their constitutional claims against it. I am unfamiliar with any suggestion that the City ever entered into that settlement based upon any conceivable notion that the stores of Beverly Books, Inc., Whitey, Inc. or Hardrock, Inc. constituted so called "replacement stores" for other previously lawfully operating stores that any of them were voluntarily abandoning. Moreover, and more to the point, the City could not rationally have come to such a conclusion as neither Beverly Books, Whitey, Inc. or Hardrock, Inc. had abandoned any lawfully operating adult bookstores in return for the City's agreement to enter into the stipulated permanent injunction on their behalf in the *Topanga Press* litigation. So that the specific facts involving each of these three stores will be clear, I have set forth below, to the best of my recollection, the dates when each of these three corporations acquired their respective businesses, as well as the relative time frames when they were first operated as so called "multiple use" adult entertainment businesses.

25. Beverly Books, Inc. acquired Le Sex Shoppe from an unrelated entity long after January 23, 1984. At the time Beverly Books, Inc. acquired Le Sex Shoppe, that business had previously been operating as a so called "dual use" adult bookstore, consisting of both retail sales and an adult arcade, and I had been informed it had been

so operating since prior to September 1, 1978. Accordingly, it had originally been *my* belief that Le Sex Shoppe was a "grandfathered" business (i.e., a lawful non-conforming use) with respect to the ordinance's "multiple use" prohibition and, as a result, when Beverly Books, Inc. first took over that store, it continued to operate Le Sex Shoppe as a "multiple use" adult bookstore. However, City officials *rejected* our contention that the ordinance provides grandfather status from its "multiple use" prohibition where a grandfathered owner sells or transfers its business to a new owner, and threatened to enforce the "multiple use" prohibition of L.A.M.C. § 12.70C against Beverly Books, Inc. As a result, it was necessary for Beverly Books, Inc. to be joined as plaintiff in the portion of the *Topanga Press* litigation challenging the City's multiple-use prohibition.

26. As noted above, I acquired Whitey, Inc. (the owner of Big Apple Bookstore) from an unrelated entity long after January 23, 1984. Because it was my understanding that the prior corporate owner did not have any "grandfather" status entitling it to operate so called "multiple" adult uses on the premises, Big Apple Bookstore did not, at least initially, attempt to operate the store as a so called "multiple-use" adult business. Rather, from the date I acquired Whitey, Inc. until approximately June of 1991, Big Apple Bookstore attempted to operate as a non-adult bookstore (which did sell some adult items, but less than a preponderance of its inventory was "adult") along with an adult arcade. However, because this was a highly inefficient and ineffective way of operating, Whitey, Inc. joined as one of the plaintiffs in the *Topanga Press* litigation who challenged the City's multiple use

prohibition. In 1991 in response to developments in the *Topanga Press* litigation, Whitey, Inc., as a plaintiff therein, announced to the court that it was, from that point forward, converting (and did in fact so convert) such that a preponderance of its retail inventory would be of so called "adult" materials.

27. As noted above, I acquired Hardrock, Inc. (the owner of J&B Books) from an unrelated entity long after January 23, 1984. Immediately prior to the time Hardrock, Inc. first acquired J&B Books, that store had been operating multiple so-called adult business activities. I do not know whether it was doing so as a lawful non-conforming use or as an unlawful non-conforming use, though I had initially assumed the former. While Hardrock, Inc. initially continued the pre-existing multiple adult uses, City officials informed us that they considered such use to be in violation of the ordinance's multiple use prohibition and, as a result, J&B Books attempted to operate as a non-adult bookstore (which did sell some adult items, but less than a preponderance of its inventory was "adult") along with an arcade. As was the case with the Big Apple Bookstore, J&B Books also found it highly inefficient and ineffective to operate in that manner and, accordingly, eventually joined as one of the plaintiffs in the *Topanga Press* litigation challenging the City's multiple use prohibition. In 1991 in response to developments in the *Topanga Press* litigation, Hardrock, Inc., as a plaintiff therein, announced to the court that it was, from that point forward, converting (and did in fact so convert) such that a preponderance of its retail inventory would be of so called "adult" materials.

28. Currently, Le Sex Shoppe, Big Apple Bookstore, and J&B Books each predominately sell adult materials, including videotapes, and exhibit adult videotapes in multi-channel viewing booths and preview booths.

29. To reiterate, I gave my approval to the settlement agreement which was entered into in the *Topanga Press* litigation between Beverly Books, Inc., Whitey, Inc., Hardrock, Inc., and the City of Los Angeles, pursuant to which the City conferred permanent lawful nonconforming use status upon those three businesses in connection with the multiple use prohibition of L.A.M.C. § 12.70C. At no point did the City suggest to me that it was entering into the settlement agreement because it perceived that any of these three stores was a "replacement" store for any other store I had owned that had voluntarily gone out of business. Moreover, that would not have been true in any event because neither I nor any of these three corporations ever owned any other stores which were voluntarily relinquished in order to facilitate the signing of the settlement agreement in the *Topanga Press* litigation.

30. I know of no factors whatsoever which would distinguish the operation or history of Beverly Books, Inc., Whitey, Inc., and Hardrock, Inc., on the one hand, from the operation and/or history of Alameda Books, Inc, or Highland Books, Inc. on the other hand, nor that would justify providing permanent lawful nonconforming use status for the former groups of businesses but denying it to the latter.

VAGUENESS/OVERBREADTH ISSUES

31. Should this court uphold the ordinance's "multi-use" prohibition on adult businesses against both our First Amendment and Equal Protection challenges, I would then have no choice but to attempt to convert the retail sales portions of both Alameda Books and Highland Books such that they would no longer be categorized as "adult" bookstores but, nonetheless, such that they would carry the *maximum* amount of "adult" sexually oriented materials consistent with a designation of such stores as *non*-adult bookstores. For example, there are hundreds of video stores in the greater Los Angeles area of which I am aware which contain substantial portions of their inventory consisting of adult sexually oriented videotapes, even though the majority of their videotapes are "non-adult." It is my understanding that the city does *not* attempt to enforce its adult zoning restrictions against *most* such businesses within its jurisdiction.

32. However, I have been informed by my attorneys that whenever an "adult" bookstore attempts to convert to a "non-adult" bookstore carrying some small amount of "adult" materials, the city has uniformly refused to supply it with any clear guidelines which can help it achieve compliance with the city's zoning requirements. I am also informed that even if virtually all adult retail materials are removed from such stores, the City will continue to characterize such stores as an "adult bookstore" even though only a very small percentage of its inventory or titles may in fact consist of "adult" inventory. Moreover, I am informed and believe that the city has taken particularly arbitrary and inconsistent positions in enforcing these provisions against businesses it

contends are "adult bookstores" and that it will never provide any consistent or binding guidelines for achieving compliance. For these reasons, should this Court reject plaintiffs' First Amendment and Equal Protection challenges, plaintiffs' two stores would not be able to safely carry *any* meaningful amount of retail adult materials (even though they would *want* to) because the ordinance is too vague to provide them with notice of how to achieve compliance while retaining the maximum permissible amount of "adult" materials. In short, because of the vagueness of the multiple use prohibition of the ordinance, we would be chilled and deterred from selling *any* meaningful amount of adult materials.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of June, 1997, within the United States of America.

/s/ Steven D. Wiener
STEVEN D. WIENER

G. RANDALL GARROU
California State Bar No. 74442
MELANIE D. LONG
California State Bar No. 173821
WESTON, GARROU & DeWITT
12121 Wilshire Blvd.
Suite 900
Los Angeles, CA 90025-1176
(310) 442-0072
(fax) (310) 442-0899

Attorneys for plaintiffs

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California Corporation; *et al.*, plaintiffs, v. CITY OF LOS ANGELES, a municipal corporation, defendant.	Case No. CV 95-7771 DDP (CTx) **DECLARATION OF G. RANDALL GARROU IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** Hearing: Date: August 25, 1997 Time: 10:00 a.m. Ctrm: 24

DECLARATION OF G. RANDALL GARROU

(28 U.S.C. § 1746)

I, G. Randall Garrou, hereby declare:

1. The following statements are true of my own personal knowledge. If called upon, I could and would testify to the following.

2. I represent plaintiffs ALAMEDA BOOKS, INC. and HIGHLAND BOOKS, INC. in the above-captioned litigation.

3. I have represented adult bookstores in the City of Los Angeles for in excess of twenty years and am well familiar with a variety of forms of ordinances which the City has used to regulate these businesses.

4. One of the most significant methods by which the City regulates these businesses is through the tool of zoning. An adult entertainment business wishing to open in Los Angeles must comply with a wide variety of zoning requirements. Pursuant to the requirements of Los Angeles Municipal Code (hereinafter "L.A.M.C.") § 12.70C, no adult business may locate in an agricultural or residential zone, nor within 500 feet of any such zone. Neither may an adult entertainment business locate within 500 feet of a church, school or park. Neither may an adult entertainment business locate within 1,000 feet of any other adult entertainment business.

5. In addition to the special zoning restrictions of L.A.M.C. § 12.70C described above, all adult entertainment businesses must additionally comply with all generally applicable zoning requirements for such businesses. For example, while adult bookstores are permissible in the C-2 and C-4 commercial zones, adult cabarets are expressly prohibited from operating in the C-4 commercial zones and the City has consistently interpreted its zoning code such that adult arcades are also prohibited in such zone.

6. The City also imposes additional operational restrictions upon adult arcades, defining them as "picture arcades" subject to regulation under L.A.M.C. § 103.101. These regulations include, among other things, restrictions establishing a minimum level of illumination in such booths, as well as requirements that no video viewing booth may have a door on it and that the interiors of such booths must be visible at all times to persons outside the booth.

7. I am also well familiar with the legislative history that the City has relied upon in enactment of its various adult zoning restrictions. I am not familiar with any piece of legislative history where the City has indicated the existence of any secondary effects caused by the *combination* of the retail sale of adult items and the exhibition of adult videotapes, as distinct from any secondary effects attributable to either individual use.

8. I have also read the City's original studies which led to its enactment in 1978 of its original adult zoning ordinance and that study, which had attempted to summarize all of the then-existing adult businesses in Los Angeles, made no mention of any business which existed simply as an adult arcade independent of any adult bookstore. To my knowledge, the City has never had any reason to believe that there has ever even *been* such a thing as an adult arcade which was not operating inside an adult bookstore.

9. In prior litigation with the City of Los Angeles in which I have been involved, the City has consistently taken the position that it was the legislative intent of the

City Council in enacting the so-called multiple use prohibition of L.A.M.C. § 12.70C, to prevent the very types of businesses operated by these plaintiffs, i.e., typical adult bookstores which include video viewing booths.

10. In my experience, the overwhelming majority of adult bookstores in Los Angeles have operated with motion picture or video viewing booths. In my experience, no adult arcades have ever existed in Los Angeles which were not inside of adult bookstores.

11. I am not familiar with any commercial businesses in the entire nation which operate such that an adult arcade is their sole or principal use. For this reason, it is my belief that the City of Los Angeles' attempt to create restrictive zoning for all "adult arcade" "businesses" is not aimed at any businesses existing in the real world but, instead, is simply a device *masquerading* as a content-neutral zoning tool, but which is in fact designed for the sole purpose of essentially preventing adult bookstores from allowing on-premises viewing of adult video tapes.

12. I am familiar with all of the City of Los Angeles' ordinances regulating adult arcades and adult bookstores. It is my opinion that, given the existence of the multiple use prohibition of L.A.M.C. § 12.70C, the effect of this restriction, if the City is allowed to enforce it, will be to eliminate all practical opportunities for members of the public to view or preview sexual oriented videotapes prior to making an on-site decision of whether to purchase or rent such videotapes. As a practical matter, no reasonable retailer of such videos would allow the free

previewing of such videos in their store as their businesses would be inundated and destroyed by virtually hordes of freeloaders who would simply view such tapes for free with no intention of making any subsequent rental or purchase.

13. Based upon my experience with the adult entertainment industry generally, I am aware that, for the vast majority of videotapes sold in adult bookstores, there is no secondary source by which a potential customer may gain familiarity with the contents of most of these videotapes other than by previewing them in the store where they are offered for sale or rental. Most of these videos are not so popular that it is likely their contents will have been written up in magazine summaries or other sources by which the public can frequently acquaint itself with the contents of more mainstream videos prior to deciding to rent or buy them.

EQUAL PROTECTION ISSUES

14. I was the lead counsel for plaintiffs in seven separate lawsuits consolidated under the title *Topanga Press, Inc., et al. v. City of Los Angeles*, C.D. Cal. No. CV 88-7838 RG, 989 F.2d 1524 (9th Cir. 1993) (*"Topanga Press"*). All 22 plaintiffs in those seven consolidated cases challenged the constitutionality of the residential proximity restrictions of Los Angeles Municipal Code ("L.A.M.C.") Section 12.70C, and approximately half of those plaintiffs additionally challenged the constitutionality of a portion of L.A.M.C. § 12.70C which prohibited operating more than one adult entertainment

"business" in the same building or commercial space (the "Prohibition").

15. Three of the plaintiffs who challenged the Prohibition were Beverly Books, Inc., (which operated Le Sex Shoppe at 5507 Hollywood Boulevard in Los Angeles), Whitey, Inc. (which operated Big Apple Bookstore at 10654 Magnolia Boulevard in Los

* * *

JAMES K. HAHN,
City Attorney (SBN: 66073)
CLAUDIA McGEE HENRY,
Senior Assistant City Attorney
SHARON SIEDORF CARDENAS,
Assistant City Attorney (SBN: 60011)
P. NELSON KING,
Deputy City Attorney (SBN: 140113)
1700 City Hall East
200 North Main Street
Los Angeles, California 90012-4130
Telephone: (213) 485-9793

Attorneys for Defendant
CITY OF LOS ANGELES

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., a California corporation, and HIGHLAND BOOKS, INC., a California corporation, Plaintiffs, vs. CITY OF LOS ANGELES, a municipal corporation, Defendant.	CASE NO. CV 95-7771 DDP (CTx) **DEFENDANT CITY OF LOS ANGELES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT DETERMINING THE UNCONSTITUTIONALITY OF THE "MULTIPLE USE" PROVISION OF L.A.M.C. § 12.70 C BASED ON THE FIRST AMENDMENT, EQUAL PROTECTION, AND VAGUENESS AND CONSEQUENT SUBSTANTIAL**

) **OVERBREADTH;**
) **DECLARATIONS OF JAMES**
) **L. BANGHAM, PETER**
) **NELSON KING, MICHAEL L.**
) **KLEKNER, AND SHARON**
) **SIEDORF CARDENAS**
)
) Date: September 22, 1997
) Time: 10:00 a.m.
) Place: Courtroom 24
) (Filed Aug. 18, 1997)
)

DECLARATION OF PETER NELSON KING

I, Peter Nelson King, the undersigned declare that:

1. I am an attorney at law, duly licensed to practice before all the courts of the State of California and I am admitted to practice in the United States District Court, Central District. I am a Deputy City Attorney and am one of the attorneys representing the City of Los Angeles in the matter herein. My business address is 1700 City Hall East, 200 North Main Street, Los Angeles, California, 90012. I am familiar with the contents of the referenced case files and the documents contained therein.

2. If called upon, I could and would competently testify to the matters set forth herein which are a matter of personal knowledge.

3. I was the attorney of record who handled all aspects of the litigation entitled *E.W.A.P., Inc. v. City of Los Angeles*, Case No. CV 95-1711(AWT) and *Steven A. Diamond and Diamond Video World, Inc. v. City of Los Angeles*, Case No. CV 95-1534 (AWT) referred to in the Complaint

of Plaintiffs Alameda Books, Inc. and Highland Books, Inc. on page 8, ¶ 26 and page 9, ¶ 29.

4. The case entitled *E.W.A.P., Inc. v. City of Los Angeles*, Case No. CV 95-1711(AWT) was filed March 17, 1995, challenging the 1,000 foot separation requirement between adult businesses required by Los Angles Municipal Code, Section 12.70C. Mr. David M. Brown (deceased) represented plaintiffs, E.W.A.P., Inc. in this case.

5. The case entitled *Steven A. Diamond and Diamond Video World, Inc. v. City of Los Angeles*, Case No. CV 95-1534 (AWT) was filed March 13, 1995, challenging the same 1,000 foot separation requirement. Mr. Roger Jon Diamond represented plaintiffs, Steven A. Diamond and Diamond Video World.

6. The issues in these two matters were similar in nature and the owners in both instances had been cited by enforcement personnel for operating two adult businesses (an adult bookstore and an adult arcade as defined by L.A.M.C. § 12.70 B 17) at one location in violation of LAMC § 12.70C. Therefore a Notice of Related Case dated March 21, 1995, was sent to the United States District Court, Central District. The cases thereafter were processed simultaneously before Judge A. Wallace Tashima.

7. During settlement discussions with both Mr. Brown and Mr. Diamond, I made it clear that the City was not interested in settling any cases wherein there was a violation of the separation requirement set forth in LAMC § 12.70C for new adult establishments.

8. Mr. Brown, nevertheless, proposed settlement of the *E.W.A.P., Inc.* case based upon the fact that the two

adult uses occurring at the location were not new uses but, in fact, had been in existence prior to the enactment of LAMC § 12.70, the City's Adult Entertainment Zoning Ordinance, which became effective on September 1, 1978. He also pointed out that this business had been "grandfathered" as part of the settlement in the *Topanga Press v. City of Los Angeles* litigation, Case No. CV 88-7838. He confirmed the date the business was established and further stipulated as part of the settlement that his client would not attempt to establish any two *new* adult uses at one location in the future. (See letter from David M. Brown dated July 10, 1995, with enclosure, attached hereto as Exhibit "18".)

9. Mr. Diamond thereafter requested that the City of Los Angeles also consider settlement of the lawsuit with Diamond Video World on the same basis i.e. that the two adult uses at one location predated the effective date of LAMC § 12.70. During the settlement discussions with Mr. Diamond, he represented to me that his client was operating an adult bookstore and an adult arcade as had the previous owner(s) at that location. The attached newspaper article that I received confirmed that what Mr. Diamond was saying appeared true; that is, that a preexisting adult bookstore and arcade business had been in operation at the location which predated the effective date of the 1978 Adult Entertainment Zoning Ordinance. (See LA Daily News article entitled *City Sued Over Adult Store Rule* by Rick Orlove, attached hereto as Exhibit "19".)

10. The belief of the parties regarding the possibility of "grandfather" status in regard to Diamond Video World was reflected in the document entitled "Joint

Report Of Early Meeting Of Counsel" which was first filed in the *Diamond* case on April 21, 1995. (See "Joint Report Of Early Meeting Of Counsel," attached hereto as Exhibit "20".)

11. I was thereafter required by law to convey both settlement proposals to my client, the City of Los Angeles. I did so by sending confidential letters entitled: "Settlement Offer – E.W.A.P. v. City of Los Angeles" and "Settlement Offer – Diamond Adult [sic] Video World v. City of Los Angeles" to the City Council.

12. On September 13, 1995, I went into a closed executive session with the City Council pursuant to Government Code § 54956.9 (a) to consider in good faith the proposed offers to settle on both matters. The City Council accepted both offers of settlement.

13. Plaintiffs Alameda Books, Inc. and Highland Books, Inc. are not in the same class as the businesses in *E.W.A.P.* or *Diamond*. The present plaintiffs were established long after the effective date of LAMC § 12.70 and, in particular § 12.70 C – the "multiple use" provision. And, thus far, neither business has represented through its counsel that it was a replacement business, part of the aforementioned *Topanga Press* case, or that it was established prior to the enactment of Ordinance No. 157,538. In fact, the plaintiffs in the current case have alleged that they are *not* entitled to "grandfather status". (Complaint ¶ 33.)

14. As one of the attorneys representing the City in the present litigation, I was responsible for handling the discovery aspect of this case. I had caused to be sent to the plaintiffs a set of written interrogatories regarding the

financial aspects of both plaintiffs businesses. Rather than answer those questions, plaintiffs proposed that they "will be hereafter barred from **asserting** in this case the proposition that no adult arcade can survive economically, unless it operates in conjunction with an adult bookstore on the same premises." (Emphasis added.) In confirmation of the above agreement G. Randall Garrou, the attorney for the plaintiffs, sent me a letter dated April 16, 1997. (See letter dated April 16, 1997, from G. Randall Garrou, attached hereto as Exhibit "21".)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 13, 1997, at Los Angeles, California.

/s/ Peter Nelson King
PETER NELSON KING
Deputy City Attorney

EXHIBIT 21

LAW OFFICES
WESTON, GARROU & DEWITT
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

[Names And Addresses Omitted In Printing]

April 16, 1997

TRANSMITTED ON THIS DATE BY TELEFAX TO (213) 485-8899; ORIGINAL SENT TODAY BY MAIL.

Peter Nelson King
Deputy City Attorney
18th Floor, City Hall East
200 N. Main Street
Los Angeles, CA 90012-4131

re: *Alameda Books, Inc. v. City of Los Angeles,*
U.S.Dt.Ct. C.D. Cal. No. CV 95-7771 DDP
Summary of Discovery Agreement reached on January 29, 1997

Dear Mr. King:

This letter will confirm the substance of our telephone conversation today in which the following occurred: (1) I indicated I had read through the proposed discovery stipulation which you recently sent me and wanted to discuss with you a number of modifications of the stipulation that we thought were necessary; (2) you indicted that you did not then have time for a detailed analysis of the terms of the stipulation but that you would call me back when your schedule cleared so we could discuss the same; (3) you requested, and I agreed, that I would provide you with a simple statement in a letter indicating our clients' position that will be taken at trial with respect to the economic issue that we had

discussed in our discovery meeting of January 29, 1997. The statement which you requested is provided below.

In order that you may limit the extent of discovery you will seek from us, and *conditioned upon your agreement to do so,* plaintiffs hereby agree that they will be hereafter barred from asserting in this case the proposition that no adult arcade can survive economically, unless it operates in conjunction with an adult bookstore on the same premises. The only slight qualification to this statement is that it should be understood that plaintiff will continue to maintain and argue that the City's ordinance absolutely prohibits a system whereby one may preview sexually oriented videotapes prior to purchasing or renting such tapes at the same store. However, this is obviously a different point that the simple assertion that no adult arcade could survive economically unless it operates in conjunction with an adult bookstore on the same premises.

I hope the statement above succeeds in alleviating some of your time pressures. I look forward to our future discussion of the specific terms of the stipulation.

Very truly yours,

WESTON, GARROU & DeWITT

By /s/ G. R. Garrou
G. RANDALL GARROU

GRG:dl
LRG3080

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., et al.,	Case No. CV 95-7771 DDP (CTx)
Plaintiffs,	**Order**
v.	**Denying Defendant's Motion For Stay or Dismissal on Abstention Grounds**
CITY OF LOS ANGELES,	**Denying Plaintiffs' Motions for Summary Judgment on First Amendment, Equal Protection, and Vagueness and Overbreadth Causes of Action**
Defendant.	**Denying in Part and Granting in Part Defendant's Motion for Summary Adjudication**
	Denying Plaintiffs' Motion to Strike Use By Defendant of Evidence Involving 1983 Ordinance to Prove Intent of City Council When Passing 1978 Ordinance
	(Filed Jan. 11, 1998)

This matter comes before the Court on the parties' cross motions for summary judgment or summary adjudication of issues and on the defendant's motion for stay or dismissal of the action on abstention grounds. The Court heard oral argument on the summary judgment motions

on October 20, 1997. The Court finds the abstention issues appropriate for decision without oral argument.

After considering the arguments and evidence presented by the parties, the Court denies the plaintiffs' motion for summary judgment. The Court grants the defendant's motion for summary adjudication of the issue of selective enforcement in violation of the Fourteenth Amendment, and of the vagueness and overbreadth issues. The defendant's motion is denied in all other respects.

I. Introduction

The central issue in this case is whether the City of Los Angeles (the "City") violates the First Amendment by enforcing a zoning ordinance that defines certain activities as "adult entertainment businesses" and prohibits the operation of more than one such business in the same building. Non-obscene adult entertainment is protected by the First Amendment free speech clause. Local governments, however, may impose special zoning restrictions on adult entertainment businesses without violating the First Amendment, provided that such restrictions are directed at harmful "secondary effects" of such businesses, and not at suppressing the content of adult entertainment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). The plaintiffs contend that the City cannot demonstrate harmful secondary effects arising from multiple adult entertainment uses within a single business, and that therefore a multiple use restriction applicable only to adult entertainment businesses violates the First Amendment. The City contends that its studies

demonstrate that concentrations of adult entertainment businesses have harmful secondary effects, and that these studies support the multiple use restriction. The Court finds that while the studies addressed concentrations of separate adult entertainment businesses in an urban area, the studies did not treat the activities conducted by the plaintiffs' – video rental and on-premises video viewing – as separate businesses. The court therefore finds that there is a genuine issue of fact whether the operation of a combination video rental and video viewing business leads to the harmful secondary effects associated with a concentration of separate businesses in a single urban area. The Court therefore denies both motions for summary adjudication of the First Amendment issues.

II. Background

The plaintiffs are corporations that each operate an adult bookstore in the City of Los Angeles. The bookstores are Alameda Books and Highland Books. The bookstores offer "non-obscene sexually-oriented" videotapes for sale and rental.[1] (Declaration of Steven D. Wiener, President of Highland Books, Inc., and Alameda Books, Inc. ("Wiener Decl.") ¶ 5.)

In addition, the bookstores include a number of booths in which customers, for a small fee, can preview videotapes offered for sale or rental in the store. (*Id.*

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[1] The parties do not dispute the characterization of the material offered by the bookstores as non-obscene. The Court finds, therefore, that non-protected obscene speech is not at issue in this case.

¶ 13.) The stores also include a number of video booths which provide customers with an average of sixty different channels of videos. For a per-minute fee, customers may browse among the channels until a timer terminates the operation of the machine. (*Id.* ¶ 12.)

The plaintiffs challenge the validity of a portion of the Los Angeles Municipal Code that prohibits the maintenance of more than one adult entertainment business in the same building.[2] The multiple use provision, LAMC § 12.70(c), is part of an adult entertainment zoning ordinance mandating a minimum distance between adult entertainment businesses.

The City enacted the statutory scheme in response to the United States Supreme Court's approval of Detroit's adult entertainment "dispersal" zoning scheme in *Young v. American Mini Theatres*, 427 U.S. 50, 96 S. Ct. 2440 (1976). In 1977, the Los Angeles Police Department and the City's Department of Planning conduced studies which concluded that concentrations of adult entertainment had deleterious effects on the neighborhoods where such business were located.

In 1978, the City enacted LAMC § 12.70, prohibiting adult entertainment businesses from being established, enlarged or subject to transfer of ownership within 500 feet of churches, schools, or parks, or within 1,000 feet of

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[2] The Court takes judicial notice of the adult entertainment zoning ordinance, Los Angeles Municipal Code ("LAMC") § 12.70. (Plaintiffs' Request for Judicial Notice ("RJN") Ex. G.) The Court also takes judicial notice of the acts of the Los Angeles City Council enacting and amending the adult entertainment zoning scheme. (Plaintiffs' RJN Exs. A-F.)

other adult entertainment businesses. (*See* Plaintiffs' RJN Ex. A.) In 1983, the City amended LAMC § 12.70 to prohibit the maintenance of more than one adult entertainment business in the same building or structure ("multiple use ordinance"). LAMC § 12.70(C). (*See* Plaintiffs' RJN Ex. C.)

Under the ordinance, the component of the plaintiffs' businesses that rents video tapes for home use is defined as an "Adult Bookstore." LAMC § 12.70(B)(2)(a). The component of the plaintiffs' businesses in which customers may view tapes on the premises is defined as an "Adult Arcade." LAMC § 12.70(B)(1). The 1983 multiple use ordinance defines an "Adult Entertainment Business" as an

> Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein, and each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment.

LAMC § 12.70(B)(17).

The City has not enforced the multiple use ordinance since its enactment in 1983. The City was enjoined from enforcing the ordinance against several bookstores in *Topanga Press, Inc., et al v. City of Los Angeles*, CV 88-7838 RG (SHx) (C.D. Cal. 1991), *aff'd*, 989 F.2d 1524 (9th Cir. 1993). (*See* Klekner Dec. Ex. 22 attached to Def.'s Am. Opp.) After the United States Supreme Court denied certiorari, the City settled the eight cases underlying *Topanga Press*,

stipulating to a permanent injunction prohibiting enforcement of the ordinance only against the *Topange Press* plaintiffs. (1 Defendant's RJN Ex. 1.)

In 1994, the City again threatened to enforce the ordinance. The targeted adult businesses filed two lawsuits. Preliminary injunctions issued in both cases, *Diamond v. City of Los Angeles*, CV 95-1534 AWT (C.D. Cal. June 9, 1995) and *E.W.A.P., Inc. v. City of Los Angeles*, CV 95-1711 AWT (C.D. Cal. June 9, 1995). The City settled, again stipulating to a permanent injunction as to the businesses involved in the lawsuits. (King Decl. ¶¶ 9-10.)

In November 1995, the plaintiffs' counsel heard from the counsel in *Diamond* and *E.W.A.P.* that the City was planning to prosecute Alameda Books under the ordinance. (Complaint ¶ 40.) The plaintiffs initiated this action seeking declaratory and injunctive relief under 42 U.S.C. § 1983. On December 19, 1995, this Court issued a preliminary injunction barring enforcement of the ordinance until its constitutionality could be determined.

The plaintiffs assert three causes of action. The first cause of action alleges that the ordinance facially violates the First Amendment free speech clause and the Fourteenth Amendment equal protection clause. The second cause of action alleges that the adult entertainment zoning scheme violates the First Amendment by failing to provide for reasonable alternative avenues of communication. (The second cause of action is not at issue in these summary judgment motions.) The third cause of action alleges that the ordinance is vague and overbroad.

Both parties have filed motions for summary judgment on the first and third causes of action. The City has

filed a motion to stay or dismiss the action on abstention grounds.

III. Abstention

The City contends that the Court should dismiss or stay this action under all three theories of federal abstention: *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

A. *Younger* Abstention

Federal courts may not enjoin or otherwise interfere with pending state criminal prosecutions absent extraordinary circumstances. In order to maintain the proper constitutional relationship between federal and state authorities, the federal courts must allow the state courts to adjudicate all claims in a pending criminal proceeding, including federal claims. *Younger*, 401 U.S. 37, 54 (1971). Of the three doctrines of abstention, only *Younger* is jurisdictional. Where it applies, the district court must dismiss the action. Schwartzer, et al., *California Practice Guide, Federal Civil Procedure Before Trial* § 2:1292.1 (Rutter 1996).

The requirements for *Younger* abstention are (1) a pending state court proceeding, (2) implication of important state interests, and (3) adequate opportunity to raise the federal claims. *Id.* § 2:1291.2.

1. Pending State Court Proceedings

For *Younger* abstention to apply, state judicial proceedings must be pending. The imminence of proceedings in the near future is not sufficient to justify *Younger* abstention. In *Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000 (9th Cir. 1995), the plaintiffs were arrested and cited for misdemeanor trespass while distributing leaflets in front of a Las Vegas hotel. The Las Vegas district attorney never filed the citations with the state court. *Id.* at 1001. The district court abstained, holding that the arrests and issuance of a misdemeanor citation triggered the *Younger* rule. The Ninth Circuit reversed, holding that the district court erred by abstaining in the absence of a state judicial proceeding. *Id.* The court held that arrest and citation are executive, not judicial acts. *Younger* abstention was, therefore, neither required nor proper. *Id.* at 1002.

Here, the City makes the same argument rejected in *Agriesti*. On August 16, 1995 a criminal misdemeanor citation was issued against Alameda Books, charging that Alameda Books operated two adult businesses in the same location in violation of LAMC § 12.70(C). The citation did not set an appearance date, but instead provided that Alameda Books would be notified of the date by the Los Angeles City Attorney's office. (Motion at 8 n.6.) The city attorney's office never initiated a criminal proceeding based on the citation, despite having three months to do so before this Court issued its TRO in November 1995. (Opp. at 10.)

Because no state judicial proceeding was pending at the time this action was filed, the Court may not apply *Younger* abstention.

B. *Pullman* Abstention (Deferral)

The City requests that the court apply *Pullman* abstention as to plaintiff Highland Books. Federal courts may abstain where a limiting construction by the state courts might make federal constitutional review unnecessary. *Pullman*, 312 U.S. at 500. *Pullman* abstention is not jurisdictional. Where it applies, the court must retain jurisdiction while the unsettled issue is litigated in state court. *Almodovar v. Reiner*, 832 F.2d 1138, 1141 (9th Cir. 1987) ("Failure to retain jurisdiction is reversible error.").

The Ninth Circuit requires the presence of the following factors for *Pullman* abstention: (1) the complaint must touch a sensitive area of social policy on which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) the case must present a state law issue whose resolution would terminate the constitutional controversy; and (3) the resolution of the state law issue must be doubtful or uncertain. *Pearl Inv. Co. v. City & Cty. of San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985).

1. Sensitive Area of Social Policy

In First Amendment cases this factor "will almost never be present because the guarantee of free expression is always an area of particular federal concern." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989). Abstention would aggravate the "impermissible chilling of the very constitutional right" the plaintiff seeks to protect. *Id.*

On the other hand, zoning and land use planning are matters of "sensitive social policy" over which federal

courts should not normally intervene. *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833-37 (9th Cir. 1984) (holding that district court erred in not abstaining where constitutional issue depended on interpretation of complex statutory land-use scheme which state courts had not yet interpreted).

The Ninth Circuit addressed the conflict between First Amendment concerns and sensitive social policy in *Almodovar*, where the plaintiffs challenged the use of state pandering and prostitution statutes to prohibit the production of sexually explicit films. The Ninth Circuit affirmed the district court's decision to abstain for two reasons. First, the court noted that statutes regulating prostitution touch an area of social policy that is arguably more sensitive than land-use planning. *Id.* at 1140. Second, the court held that abstention would not aggravate any chilling effect because that state issue in question could be adjudicated in a single proceeding with little delay, after which the plaintiffs could pursue any remaining constitutional claim. *Id.* at 1140-41. In addition, other parties were presenting the same issues to the California Supreme Court in a case pending at the time the district court decided to abstain. *Id.* Therefore, the state issue was likely to be resolved without substantial delay.

The city argues that here, as in *Almodovar*, there is no danger of a chilling effect. Plaintiff Highland Books has been in business since 1987. LAMC § 12.70(C) has been in effect during that entire time. The City argues that Highland Book's failure to challenge the ordinance before now indicates that its expression has not been chilled. (Reply at 2.) This argument ignores the effect of the City's renewed enforcement on the ordinance as signaled by the

misdemeanor citation issued to Alameda Books on August 16, 1995. In addition, here, unlike in *Almodovar*, there is no pending state court proceeding that might produce a limiting construction of the ordinance before a significant chilling effect has occurred. Therefore, it is appropriate for the Court to treat this case according to the *Ripplinger* rule where First Amendment freedom of speech is at issue.

2. Existence and Uncertainty of State Law Issue

The question under this factor is whether the law at issue is fairly susceptible to a constitutional construction by a state court applying state law. The City argues that because Highland Books has never been cited or inspected under the statute, "in the absence of some administrative determination, it is not possible to know how LAMC § 12.70(C) would be applied to this business." (Motion at 4.) The lack of enforcement, however, is not relevant to *Pullman* abstention. The relevant question is not whether law enforcement authorities will interpret the statue so as not to chill Highland's freedom of expression, but whether the state courts will interpret the statute.

The plaintiffs argue that the case law in California has already narrowed the definition of "adult entertainment uses" in such a way as to foreclose the possibility of state court decisions that would moot the federal constitutional issue. In *People v. Superior Court (Lucero)*, 49 Cal. 3d 14, 259 Cal. Rptr. 740 (1989), the California Supreme Court set forth a standard for interpreting anti-clustering ordinances that restrict adult entertainment business

within a certain distance of each other. Prior to *Lucero*, the California courts had limited construction of these statutes so that they only applied to businesses whose activities were at least 50% adult entertainment. *Pringle v. City of Covina*, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981). The *Lucero* court rejected this preponderance standard because it defeated the anti-clustering ordinance's purposes. Instead, the court endorsed a standard under which a business that engaged in a "regular and substantial course of conduct" of adult entertainment would be covered by adult entertainment ordinances. *Lucero*, 49 Cal. 3d at 27-28. The *Lucero* court expressly overruled *Kuhns v. Board of Supervisors*, 128 Cal. App. 3d 368, 181 Cal. Rptr. 1 (1982), which had applied the *Pringle* preponderance standard to adult bookstore uses such as those at issue in this case. *Lucero*, 49 Cal. 3d at 28 n.10. The plaintiffs argue that because the California Supreme Court has set the *Lucero* standard as the most restrictive possible definition of an adult entertainment use, no further narrowing on state law grounds could remove Highland's combined bookstore/video arcade from the ordinance's coverage. (Opp. at 6.)

The City asserts that *Lucero* did not foreclose every possible narrowing construction.[3] The City argues that

[3] The *Lucero* opinion noted that a municipality remains "free to further define the standard – for example, by making reference to a percentage of films shown, or the percentage of revenue received by the adult entertainment business. It may also amend its ordinance to impose less restrictive standards." *Lucero*, 49 Cal. 3d at 28 n.9. This dictum provides no guidance here. The City has not chosen to narrow its ordinance in this fashion.

the California courts could construe LAMC § 12.70(c) not to prohibit multiple uses by the same owner, or where two businesses have traditionally been operated together. (Reply at 3.) The plain language of the ordinance, however, forecloses such a construction. The ordinance provides that each adult entertainment business "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." LAMC § 12.70(B)(17). This language does not lend itself to the type of limiting construction suggested by the City. *Pullman* abstention is therefore not appropriate in this case.

C. *Burford* Abstention (Comity)

Burford abstention prevents interference with a state regulatory scheme. The Ninth circuit requires the following factors to be present: "(1) that the state has concentrated suits involving the local issue in a particular court; (2) that the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy." *Tucker v. First Maryland Sav. & Loan, Inc.*, 942 F.2d 1401, 1405 (9th Cir. 1991). Where these factors are present, dismissal rather than stay is appropriate. *Id.*

Burford abstention is inappropriate where federal issues are controlling. "A case involving a first amendment challenge to a state statute is unlikely to implicate purely local issues that the state courts may be especially competent to deal with." *Ripplinger*, 868 F.2d at 1049 n.6.

Here, although the City calls LAMC § 12.70(C) a zoning ordinance, the City has not claimed that the instant dispute is the subject of a zoning variance or other administrative procedure that might give rise to *Burford* abstention. The only process initiated against the Plaintiffs is the misdemeanor citation issued to Alameda Books. As discussed above, the City did not pursue a criminal or administrative proceeding as a result of this citation.

Because there is no current administrative proceeding, and because the federal issues in this case are likely to be controlling and are easily separable from any complicated state law or regulatory issues, the Court concludes that *Burford* abstention is inappropriate.

IV. Summary Judgment

A. Standard for Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In order to defeat a motion for summary judgment, there must be facts in dispute that are both genuine and material, i.e., there must be facts upon which a fact finder could reasonably find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The court does not weigh the evidence or make credibility determinations; rather, the court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Id.*

The initial burden of establishing that there is no genuine issue of material fact lies with the moving party. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 323; *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Once the movant has met this burden by producing evidence that, if left uncontroverted, would entitle the moving party to a directed verdict at trial, the burden shifts to the non-movant to present specific facts showing that there is a genuine issue of material fact. *See* Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Lake Nacimiento Ranch Co. v. San Luis Obispo*, 841 F.2d 872, 876 (9th Cir. 1987).

B. Statute of Limitations

The City contends that plaintiffs' claims are barred by the one-year statute of limitations borrowed from California law for this § 1983 action. *See Cervantes v. San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993). The court previously rejected the statute of limitations defense when the City offered it in opposition to the preliminary injunction. (Order Granting Preliminary Injunction, Dec. 20, 1995.) The multiple use amendment to LAMC § 12.70 was enacted in 1983. The plaintiffs did not file this action until twelve years later. The plaintiffs argue that their action could not have accrued in 1983 because their businesses did not exist until early 1991 and 1992. If their cause of action accrued at the time of the formation of the businesses, then three to five years passed before they filed their complaint.

In a facial challenge under the First Amendment, however, the injury is viewed as continuing "based upon

the statute's on-going effect on protected speech." *Santa Fe Springs Realty v. City of Westminster*, 906 F. Supp. 1341, 1364-65 (C.D. Cal. 1995) (rejecting statute of limitations defense to facial challenge of adult entertainment licensing ordinance). In addition, the plaintiffs contend that because the City had stipulated to non-enforcement of the ordinance in previous lawsuits, the plaintiffs had no reason to believe that it would be enforced against them until plaintiff Alameda Books was cited in August 1995 for violating the ordinance.

Because of the continuing nature of First Amendment injuries, the Court rejects the City's statute of limitations defense.

C. First Amendment

The city asserts that the multiple use ordinance is a valid time, place and manner restriction based not on the content of the plaintiffs' speech, but on the deleterious secondary effects associated with adult entertainment businesses. Ordinarily, the government may not apply time, place and manner restrictions based on the content of speech. *Renton*, 475 U.S. at 46-47, 106 S. Ct. at 928. Although the ordinance here targets adult entertainment businesses based on specific definitions of adult content, such restrictions are not content-based if the predominate purpose of the ordinance's enactment is to ameliorate deleterious secondary effects of such businesses. *Id.* at 48.

A content-neutral time, place and manner restriction on speech is constitutional if it furthers a substantial government interest and is narrowly tailored to affect no

more speech than is essential to the furtherance of that interest. *Young*, 427 U.S. at 79-80, 96 S. Ct. at 2457 (Powell, J., concurring) (citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)).

In the adult entertainment context, the Ninth Circuit has used a three-step analysis to determine whether an ordinance is a valid time, place and manner restriction. *See Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir. 1987). The first step is to determine whether the ordinance bans the plaintiffs' expressive conduct altogether. If it does, it is not a "time, place and manner restriction." *Id.* The second step is to determine whether the ordinance should be analyzed as content-based or content-neutral. Where, as here, the ordinance on its face differentiates on the basis of content, the issue is whether the predominate motivation in passing the ordinance was to ameliorate adverse secondary effects of speech rather than to suppress speech itself. *Id.* If the restriction is content-neutral, the third step is to determine whether the restriction serves a substantial government interest, is narrowly tailored to serve that interest and allows for reasonable alternative avenues of communication. *Id.; see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.*, 112 S. Ct. 501, 511 n.* (noting that under *Renton* "regulations must be 'narrowly tailored' to advance the interest asserted by the State"). Although the regulation must be narrowly tailored to serve a substantial government interest, it need not be the least restrictive means of serving that interest. *Ward v. Rock Against Racism*, 491 U.S. 781 109 S. Ct. 2746 (1989); *Renton*, 475 U.S. at 52, 106 S. Ct. at 931 (noting that

state and local governments have broad latitude to choose means of ameliorating secondary effects).

1. Time, Place and Manner Restriction

The plaintiffs argue that the ordinance is not a time, place and manner restriction because it would eliminate entirely a particular type of expression – the operation of a combination bookstore/arcade – rather than limiting such expression to a particular time, place or manner. (Plaintiffs' First Amendment Motion ("FA Motion") at 11-12.) The plaintiffs contend that a combination bookstore/arcade represents a unique form of expression because it allows customers to preview video tapes before purchasing or renting them. (Wiener Decl. ¶¶ 13, 16, 19: Plaintiffs' FA Statement of Uncontroverted Facts ("UF") ¶¶ 31-33.) For purposes of clarity, the Court will refer to this purported form of communication as "on-premises previewing."

The issue is whether on-premises previewing is a form of communication protected by the First Amendment. If on-premises previewing is a form of communication, then the City may not enforce an ordinance that prevents this form of expression anywhere in the City. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76, 101 S. Ct. 2176, 2186 (1981) (holding that zoning ordinance construed by state courts to ban all live entertainment in municipality is not valid time, place and manner restriction). The difficulty with plaintiffs' argument on this point, however, is that the plaintiffs fail to demonstrate how customers receive any message via on-premise previewing that they cannot receive by patronizing separate

bookstores and video arcades. The plaintiffs cite no authority for the proposition that the "ability of adult business customers to view or preview constitutionally protected sexually-oriented videotapes immediately prior to renting or purchasing the videotape is clearly protected by the First Amendment." (Plaintiffs' FA Reply at 11.)

The plaintiffs contend that persons interested in sexually-oriented videotapes have only limited access to information needed to inform their purchasing decision because such videotapes are not reviewed in the mainstream media. (Plaintiffs' FA Motion at 20.) Mainstream films are widely reviewed on television, radio and in newspapers as well as by word of mouth. (*Id.*) The plaintiffs contend that the only outlet for similar information about sexually-oriented videotapes is the combination bookstore/arcade that allows customers to gain information about the tapes by previewing them. (*Id.*) The City responds that the plaintiffs have ample opportunities to communicate with their customers about the content of the videos in the stores via posters, the videotape cartons, video monitors in the stores, or free preview booths, which the City contends would not constitute separate "adult arcades" under the ordinance. (Def. Opp. at 11.)

The Supreme Court has held that the right of free speech also protects a corresponding "right to receive" speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, 96 S. Ct. 1817, 1823 (1976). The right to receive information, however, does not imply a right to receive information in any particular way. *See Hoffman Estates v. Flipside*, 455 U.S. 489, 102 S. Ct. 1186 (1989) (upholding restriction on the

sale of items displayed in proximity to drug-related literature because merchant has only an "attenuated interest" in displaying literature in any way the merchant desires).

No court, however, has considered whether on-premises previewing is protected by the First Amendment. An analogous issue is presented in cases dealing with ordinances that require stores to display adult magazines behind "blinder racks" to obscure magazine covers which the state deems "harmful to minors." *See, e.g., Berry v. City of Santa Barbara*, 40 Cal. App. 4th 1075, 47 Cal. Rptr. 2d 661 (1995). Although such restrictions burden adults' First Amendment right to receive non-obscene material, they have been upheld as justified by the state's compelling interest in protecting children. *See id.* 40 Cal. App. 4th at 1086, 47 Cal. Rptr. 2d at 668; *American Booksellers v. Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990). The customers' right to preview the magazines before purchase is satisfied because customers can read the unblinded portion of the cover to "determine the basic content of the publication, and thus, whether they wish to purchase it." *Berry*, 40 Cal. App. 4th at 1086, 47 Cal. Rptr. 2d at 668.

Here, as in the blinder rack cases, customers of a stand-alone adult bookstore can freely peruse among the shelves and determine from the advertising on the videotape cartons whether they wish to purchase or rent a tape. The First Amendment does not require that customers be able to preview the videotapes through a commercial arcade enterprise on the premises.

Nor does the First Amendment require a more extensive right to preview adult videotapes because information about them is scarce in the mainstream media. The

unpopularity of a particular type of speech does not give it greater First Amendment protection. In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559 (1981), the Supreme Court upheld a state fair rule that limited charitable solicitation to fixed booths. The religious organization challenging the rule had argued that the rule favored organizations whose booths would attract more listeners than those of less popular organizations. The Court found that any disparate impact on unpopular speech did not invalidate the rule as a reasonable time, place and manner restriction. *Id.* at 649 n.12.

Here, the plaintiffs have not raised a genuine issue as to suppression of a purported right to on-premises previewing. There is a separate question, however, as to whether the ordinance would completely suppress adult arcades by mandating their separation from adult bookstores. The *Young* plurality noted that secondary effects doctrine should not apply "if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. 73 n.35. "The test for determining whether the Adult Business' First Amendment rights are threatened is whether a local government has 'effectively den[ied] . . . [the Adult Businesses] a reasonable opportunity to open and operate' their enterprise within the city in question." *Topanga Press*, 989 F.2d at 1529 (quoting *Renton*, 475 U.S. at 54). In determining whether a regulation suppresses speech, however, the Court may not consider the economic injury caused by the regulation. *Topanga Press*, 989 F.2d at 1524. That the operation of a

free-standing video arcade might be economically unviable is irrelevant.[4] *See Id.*

The only evidence offered by the plaintiffs for the proposition that the ordinance eliminates free-standing arcades is the declaration of Steven Wiener, the president of Alameda Books and Highland Books. Wiener declares that during his 15 years in the adult entertainment industry he has never seen or heard of a free-standing adult video arcade. (Wiener Decl. ¶ 17; *see also* Garrou Decl. ¶ 11.) The City contends that free-standing video arcades or their equivalents have existed since the late nineteenth century in the form of "peep shows," "penny arcades" and "nickelodeons." (Def. Motion at 13-14; Def. Opp. Exs. 6-9.) The Court finds that the existence of penny arcades in the 1890s is not relevant to the question of whether adult video arcades can exist separately from adult bookstores in the 1990s.

In addition the City asserts that the plaintiffs operated their adult video arcades as separate businesses for at least three years. (Def.'s Statement of Genuine Issues ¶ 35; Second Decl. of Steven Wiener in Support of Plaintiffs' Application for Preliminary Injunction ¶ 2 (asserting that from 1987 to 1990, only the arcade at Alameda Books met the ordinance's definition of an adult entertainment

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[4] In addition, the plaintiffs have entered into a stipulation barring them from "asserting in this case the proposition that no adult arcade can survive economically, unless it operates in conjunction with an adult bookstore on the same premises." (King Decl. Ex. 21.) The plaintiffs entered into this stipulation in return for the defendant's agreement not to seek discovery of financial information relating to their businesses. (*Id.*; King Decl. ¶ 14.)

business); *id.* ¶ 4 (asserting same for Highland Books from 1987 to 1991). This assertion is misleading. From 1987 to approximately 1991, Alameda Books and Highland Books reduced the percentage of adult material in the bookstores to below fifty percent. At that time, the California courts had construed adult entertainment zoning ordinances to cover only businesses whose stock in trade included a preponderance of adult content.[5] Thus, the arcades were never truly free-standing, but were always attached to some type of bookstore.

The Court finds that the plaintiffs have not raised a genuine issue as to whether the ordinance would eliminate video arcades by separating them from bookstores. Wiener's assertion that he has never seen an independent arcade is insufficient to demonstrate that independent arcades cannot exist. The Court notes, however, that the contention that the zoning scheme does not leave space in

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[5] From 1987 to 1991, Alameda Books and Highland Books operated as "Pringleized" bookstore/arcades. The term refers to *Pringle v. City of Covina*, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981), *overruled by Lucero*, 49 Cal. 3d 14, 259 Cal. Rptr. 740. *Pringle* construed in adult entertainment ordinance to apply only to businesses in which 50% or more of the stock in trade consisted of adult material. In response to this construction of the ordinance, Alameda Books and Highland books reduced their adult bookstore inventory to less than 50% adult material in order to be allowed to maintain their video arcades. (Plaintiffs' Response to City's Statement of Genuine Issues 10.) Such a strategy would no longer work to remove a business from the scope of the ordinance because the *Pringle* preponderance standard has been replaced with a "regular and substantial use" standard, under which both the bookstore and arcade uses would meet the adult content definition. *Lucero*, 259 Cal. Rptr. at 741.

Los Angeles for the relocation of separated arcades and bookstores will be addressed in adjudication of the second cause of action, which is not part of this motion.

2. Content Neutral

Ordinances enacted for the purpose of regulating speech based on content presumptively violate the First Amendment. *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334 (9th Cir. 1986). Although the ordinance here targets adult-entertainment businesses based on a specific definition of adult content, the ordinance may be treated as content-neutral if the predominate purpose of its enactment was to ameliorate harmful secondary effects of adult entertainment businesses. *Renton*, 475 U.S. at 48, 106 S. Ct. at 929. In order to be treated as content-neutral, the regulation must be "justified without reference to the content of regulated speech." *Id.* (internal quotation marks omitted). This requirement is met if the involved ordinance is "aimed to control secondary effects resulting from the protected expression" rather than to inhibit the protected expression itself. *Tollis*, 827 F.2d at 1332.

In support of its contention that the predominate purpose of the multiple use ordinance was to ameliorate secondary effects, the City points to the language of the 1977 ordinance at its 1983 amendment, the 1977 secondary effects studies relied upon the by the [sic] City Council, and the planning department staff report prepared for the City Council in connection with the 1983 multiple use amendment.

The Court finds that there is no genuine issue of fact as to whether the 1978 and 1983 City Councils expressed a predominate purpose to ameliorate the secondary effects of adult entertainment businesses. The 1978 ordinance contained a preamble finding that the concentration of adult businesses "tends to result in the blighting and degradation of the areas of such concentration." (Plaintiffs' RJN, Ex. A at 4 (Ordinance 151,294, enacted on Jul. 28, 1978).) The multiple use restriction was first enacted as an urgency ordinance in 1982, which included the legislative finding that "the concentration of adult entertainment businesses at a single location may tend to have an adverse impact on the neighborhood in which they are located and is contrary to the dispersal approach taken by the City in enacting the adult entertainment ordinance." (Plaintiffs' RJN Ex. C at 17 (Ordinance 156,509, enacted Mar. 10, 1982).) Both ordinances refer to the 1977 police and planning department studies which had concluded that concentrations of adult entertainment uses have adverse secondary effects. In 1982, the Planning and Environment Committee of the City Council requested a report from the planning commission on the need to amend the adult entertainment ordinance to prohibit more than one adult entertainment business at a single location. (3 Def's RJN Ex. 5.) The planning commission staff reported that the 1978 ordinance had been interpreted by the Department of Building and Safety to allow the combination of several adult businesses "within the exterior structural walls of a single building at one site." The staff report recommended passage of the multiple use ordinance as a means of preventing concentrations within a single building. (*Id.*)

In light of this legislative history, the Court finds that the 1978 ordinance and the 1983 multiple use amendment were aimed to control secondary effects rather than to suppress speech.

The plaintiffs contend that the Court must look behind the City Council's expressed intent in order to determine whether the evidence before the City Council actually supported the conclusion that multiple uses within a single building caused adverse secondary effects. Some courts have held that a city must prove adverse effects in order to meet the content neutral prong. *See, e.g., Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 932 F. Supp. 1256 (D. Colo. 1996); *Sebago, Inc. v. City of Alameda*, 211 Cal. App. 3d 1372, 259 Cal. Rptr. 918 (1989). The approach taken by the Ninth Circuit, however, has been to determine content-neutrality based on the local government's stated predominate purpose. Then, as part of the substantial government interest prong, the city's stated purpose is evaluated to determine whether adverse effects actually exist and are caused by the speech that the ordinance restricts. *See Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219, 221 (9th Cir. 1989); *Tollis*, 827 F.2d at 1332-33, *Walnut Properties*, 808 F.2d at 1334. This is also the approach applied in *Renton* itself. 475 U.S. at 48-53, 106 S. Ct. 929-30 (examining the stated purpose of ordinance to determine content-neutrality, then examining evidence of secondary effects to determine substantial government interest); *see also, ILO Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir. 1994) (holding that failure to prove adverse secondary effects implicates the substantial government interest prong, not the content-neutral prong). The plaintiffs'

arguments regarding the applicability and validity of the 1977 studies are appropriately considered as part of the third prong of *Renton* analysis, in order to determine whether the ordinance is narrowly tailored to serve a substantial government interest.

3. Whether The Multiple Use Ordinance is Narrowly Tailored to Serve a Substantial Government Interest

There can be no question that a city's interest in combating urban blight is substantial. *Renton*, 475 U.S. at 50, 106 S. Ct. at 930; *Tollis*, 827 F.2d at 1332. The issue is whether the multiple use ordinance furthers that interest. In order to demonstrate that the ordinance serves its interest in combating urban blight, the City has the burden to "prove that existence of the 'secondary effects' it is seeking to prevent." *Acorn*, 887 F.2d at 222.

In *Acorn*, the City of Seattle imposed a licensing fee on video arcades in 1955. The City justified the fee as a means of paying the law enforcement costs of dealing with crimes committed in the video arcades. In 1986, Seattle began enforcing design restrictions that made the video arcades less private, and therefore less useful for prostitution and drug dealing. The plaintiff in *Acorn* contended that the resulting reduction in crime removed the adverse secondary effect on which Seattle based its claim of a substantial government interest for the licensing fee. The Ninth Circuit agreed with the plaintiff, holding that the district court's factual finding that the arcades "currently" fostered criminal activity was clearly erroneous. *Id.* at 224. While the court accepted the city's argument

that it had a substantial interest in controlling crime, it held that the licensing fee was unconstitutional because the adverse secondary effect on which the city relied no longer existed. *Id.*; *see also Tollis*, 827 F.2d at 1333 (holding that city had failed to demonstrate that single showing of an adult movie would have any harmful secondary effects on the community).

In addition, the methods selected to combat the adverse secondary effects must be narrowly tailored to affect only that category of adult entertainment shown to produce the unwanted secondary effects. *Tollis*, 827 F.2d at 1333; *Renton*, 475 U.S. at 52, 106 S. Ct. at 931; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31, 113 S. Ct. 1505, 1517 (1993) (rejecting application of secondary effects doctrine to ban use of newsracks to dispense commercial handbills because city made no showing that secondary effects were unique to commercial newsracks and not also caused by newspaper racks, which were not regulated). If the operation of a bookstore and arcade as a multiple use does not produce the secondary effects observed in the 1977 studies, then the ordinance fails the narrow tailoring test.

The issue is whether the operation of an adult arcade and bookstore on the same premises creates the type of adverse secondary effects identified in 1977 studies.

The police department study, entitled "The Impact of Sex Oriented Businesses in the City of Los Angeles" compared crime and arrest statistics for the Hollywood area to citywide crime and arrest statistics during the period from 1969 to 1975. (4 Def.'s RJN Ex. 5 at 653.) The

study concluded that an increase in prostitution, robberies, assaults and thefts for the Hollywood area was positively correlated with an increase in adult entertainment businesses in the area. (*Id.* at 655.) The study considered four types of adult businesses: "hard-core motels," "bookstores," "theaters," and "massage parlor/scam joints." (4 Def.'s RJN Ex. 5 at 657.) Video arcades are not one of the categories in the police study. It is unclear from the police study whether video arcades are considered at all, or whether they are included as a type of "theater" or were included in combination with the "bookstores."

In addition to its objective component, the police department study included letters from police officers stating their personal observations that crime had increased in Hollywood with the growth of adult entertainment businesses. (*Id.* at 662-71.) The police department study also included a section entitled "Letters from Businessmen, Clubs, Churches, Etc., Regarding Hollywood." (*Id.* at 672-828.) The letters, numbering in the hundreds, generally express opposition to the content of adult entertainment, and urge the police department to do everything possible to shut down adult entertainment businesses.

The planning department study, entitled "Study of the Effect's of the Concentration of Adult Entertainment Establishments in the City of Los Angeles" concluded that the concentration of adult entertainment businesses had deleterious effects on the community. The objective portion of the planning department study selected five areas of "known concentrations of adult entertainment businesses." (*Id.* at 379.) The five "study areas" were each

compared to a nearby "control area" selected for its lack of adult entertainment businesses. The study measured changes assessed value of land and improvements for properties in the study areas and control areas from 1970 to 1976. (*Id.*)

The planning department study counted four types of adult entertainment businesses for purposes of defining an area of high concentration: "massage parlors," "bookstores/arcades," "theaters," and "adult motels." (*Id.* at 380-87.) The study does not state whether the businesses classified as "bookstores/arcades" were free-standing bookstores or arcades, or combination bookstore/arcades.

The study concluded that assessed property values increased in all of the study areas from 1970 to 1976. (*Id.* at 383.) Two areas of adult entertainment concentration registered much higher increases in property values than did their control areas. (*Id.* at 383-88.) Three of the study areas registered lower rates of increase than did their control areas. (*Id.*) The objective portion of the study concluded that

> there would seem to be some basis to conclude that the assessed value of property within the study areas containing concentrations of adult entertainment businesses have *generally* tended to increase to a lesser degree than similar areas without such concentrations. However, there would appear to be insufficient evidence to support the contention that concentrations of sex-oriented businesses have been the *primary cause* of these patterns of change in assessed valuations between 1970 and 1976.

(*Id.* at 388-89.)[6]

The planning department study also included a report from the police department on changes in the concentration of adult businesses in the entire City of Los Angeles from 1975 to 1976, updating and expanding the police department study described above, which considered only Hollywood during the period from 1969-75. (*Id.* at 414-16.) This updated police department report classified adult entertainment uses as "adult motels," "massage parlors," "bookstores/arcades," and "theaters." (*Id.* at 414.)

The City contends that the planning department study identified "bookstores and adult arcades as distinct adult entertainment businesses for purposes of its work." (Defendant's UF ¶ 39.) The City correctly points out that the introduction to the planning department study names arcades and bookstores separately among the adult entertainment establishments considered by the study. (*Id.*) The Court finds, however, that the body of the study, in categorizing adult businesses for purposes of determining the effects of their concentration, treats bookstore/arcade combinations as single businesses. In defining

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[6] The planning department study also included subjective portions, one of which was a mail survey of real estate agents and appraisers to determine their opinion of the impact of concentrations of adult entertainment businesses on property values. The majority of the respondents indicated their belief that adult entertainment businesses had a negative impact on property values. (*Id.* at 396-406.)

areas of concentration, the study treats bookstores/arcades as a single unit of entertainment whose secondary effects arise from proximity to several other units of adult entertainment. The study does not analyze bookstore/arcade combinations as concentrations of adult entertainment businesses.

The City contends that because many of the adult entertainment businesses in the studies were classified as "bookstores/arcades," the studies support a finding that the combination of a bookstore and arcade on the same premises creates the adverse secondary effects found in the studies. (Def.'s UF ¶ 43.) The City's argument, however, ignores the purposes and conclusions of the studies. The studies were not directed at determining the impacts of individual adult entertainment businesses. Instead, the studies were concerned with the impacts created by concentrations of numerous adult entertainment businesses in small areas. The stated purpose of the studies was to determine whether a "dispersal" zoning ordinance of the type approved in *Young* would be appropriate for Los Angeles. (3 Def.'s RJN Ex. 5 at 357.)

By categorizing certain businesses as "bookstores/arcades," and examining areas where such bookstores/arcades were found in close proximity to several other adult entertainment businesses, the studies determined not the impact of a bookstore/arcade on the surrounding area, but the impact of bookstores/arcades as part of a concentration in combination with other adult businesses. The existence in the studies of the bookstores/arcades category does not support the City's contention that it has a substantial interest in separating bookstores from arcades. To the contrary, the fact that bookstores/arcades

were studied as unitary businesses militates in favor of a finding that the studies do not demonstrate that such a combination business is a concentration leading to the adverse secondary effects demonstrated by the studies. *See Walnut Properties*, 808 F.2d at 1335 (holding that city failed to establish that restriction on proximity to a church of the city's only adult theater was justified by its substantial interest in preventing concentration of adult businesses, because one adult business could not be concentrated with itself).

The studies support the City's general contention that it has a substantial government interest in addressing the adverse secondary effects of concentrations of adult businesses. There remains a genuine issue of fact, however, as to whether a combination bookstore/arcade of the type operated by the plaintiffs is a single business or a combination of two separate adult entertainment businesses of the type addressed by the 1977 studies. (*Compare* Def.'s UF ¶¶ 3, 7, *with* Pls.' UF ¶¶ 1-9, 29-31.)

The plaintiffs assert that their bookstores/arcades are single businesses for purposes of concentration-generated effects. The plaintiffs point to the physical layout and methods of operation of their businesses. Both activities take place in the same storefront with no physical separation at Alameda Books and only slight physical separation at Highland Books. (Wiener Decl. ¶ 8.) Customers enter and leave through one door, whether they are coming to use the bookstore or the arcade component of the businesses. (*Id.*) During most hours, one employee operates both the bookstore and the arcade. (*Id.* ¶ 7.) The arcade booths are used to promote rentals and sales from the bookstore. (Wiener Decl. ¶¶ 13, 15.)

The City contends that the bookstore and arcade components are separate because the ordinance defines them as separate uses. *See* LAMC § 12.70 (B)(17). The City contends that the police power to zone uses of land includes the ability to define certain activities as separate uses, even if they take place in the same business establishment. The City points to zoning regulations that define bakeries, dry cleaners, candy stores, drugstores, florists, grocery stores, butcher shops and delicatessens, automobile repair garages, and automobile services stations as separate uses, even though they may be operated in a single location. *See* LAMC § 12.13. (Def's Second RJN Ex. 15.)

The flaw in the City's argument, however, is that its police power is subject to a higher standard of review when used selectively based on protected speech. The City asserts that "[t]he City's Zoning Code defines many businesses, *both adult and non-adult*, as being separate uses even though they may be operated at a single location." (Def.'s UF ¶ 79 (emphasis added).) The City's authority to define businesses as separate uses without reference to protected speech may not be questioned by this Court if there is any rational basis for the classification. The classification of certain adult entertainment activities as separate businesses, however, is subject to a different standard of review because the City applies these definitions only to businesses that engage in protected speech. *See Schad*, 452 U.S. at 68, 101 S. Ct. at 2182-83 (noting that standard applied to judicial review of zoning power depends on "the nature of the right assertedly threatened or violated;" where property rights are affected, rational basis review applies; where free

speech rights are infringed, zoning law must be narrowly drawn to further a substantial government interest"). Because the separate business definitions in LAMC § 12.70(C) apply only to adult entertainment uses, and therefore discriminate on the basis of protected speech, they are subject to a higher level of review than rational basis, even when, as here, they are treated as content neutral under *Renton*. Thus, unlike the bakery, grocery, and service station definitions, the adult entertainment business definitions must be narrowly tailored to serve a substantial government interest. The City may not require adult bookstores/arcades to separate their businesses without demonstrating that the conduct of these activities in the same building has the adverse secondary effects demonstrated by the 1977 studies. The City's reliance on the zoning regulations applicable to bakeries and groceries would only be justified if the City required that all bookstore/arcade combinations be defined as separate businesses regardless of adult content. Such an across-the-board regulation would be subject only to rational basis review. But where, as here, the City applies the restriction only to bookstores/arcades that engage in protected speech, the higher standard of review must be applied. *See Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987) (holding that adult entertainment regulations under *Renton* require "more than a rational basis" to justify discrimination based on protected speech).

In addition, the City points to the different treatment of bookstores and "coin-operated amusements," such as arcades, in zoning regulations other than the adult entertainment ordinance. (Def.'s UF ¶¶ 81-88; Eberhard Decl. ¶¶ 5-9.) The City points to the declaration of Franklin

Eberhard, the Deputy Director of the Department of City Planning, and one of the authors of the 1977 planning department study. Eberhard declares the City has "historically regulated amusement enterprises separately from retail uses" because the two types of business involve different types of impact on the surrounding community. (Eberhard Decl. ¶¶ 4-7.) A bookstore, as a retailing operation in which the customers buy goods for consumption off-site, has a different impact in the form of "noise, hours of operation, parking and loitering," than does a video arcade which provides on-site public entertainment. (*Id.*)

Eberhard's declaration would be dispositive if the question were whether the City had a rational basis for an across-the-board regulation separating all bookstores from all video arcades. The City's police power clearly encompasses regulations meant to reduce noise, parking and loitering. The multiple use ordinance at issue here, however, applies to a set of bookstores/arcades defined by their exercise of protected speech. As discussed above, in order to single out businesses based on speech without violating the First Amendment, the City must demonstrate that the adult bookstore/arcade combination produces adverse secondary effects that would not be produced by a non-adult bookstore/arcade combination. *See Schad*, 452 U.S. at 73-74, 101 S. Ct. at 2185 (holding that municipality failed to demonstrate that live entertainment restricted by ordinance would produce secondary effects that would not also be produced by other, non-restricted commercial activity).

In addition, Eberhard makes the more general assertion that he has "had the opportunity to study the effects

of the provision of more than one type of business at a single location" and that in his experience "a location that only has one business does not have as many impacts on the surrounding community compared to a location with more than one business." (Eberhard Decl. ¶ 10.) While Eberhard's declaration might be sufficient to defend an ordinance that prohibited all multiple uses, it is irrelevant to the question whether an ordinance that prohibits multiple uses based on content violates the First Amendment. The argument that more than one business in a location has harmful secondary effects does not justify prohibiting multiple uses only for adult entertainment business and not for other types of businesses. *See City of Cincinnati*, 507 U.S. at 430-31, 113 S. Ct. at 1517 (rejecting application of secondary effects doctrine to ban on use of newsracks to dispense commercial handbills because city made no showing that secondary effects were unique to commercial newsracks and not also caused by newspaper racks which were not regulated); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225, 110 S. Ct. 596, 604 (1990) (noting that where generally applied licensing scheme is more onerous with respect to sexually oriented businesses than with respect to the majority of other businesses, First Amendment rights are implicated).

The City relies on *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), for the proposition that a finding of harmful secondary effects from concentration of adult entertainment businesses can support a multiple use restriction. In *Hart Book Stores*, the Fourth Circuit upheld an ordinance similar to the one at issue here. The ordinance defined an "adult establishment" as any adult bookstore, adult motion picture theater, adult mini

motion picture theater, or massage business, and prohibited the operation of more than one establishment in one building. *Id.* at 823. The only evidence offered to show the secondary effect of multiple uses was a report from the county health department on the unsanitary conditions found on a visit to five adult arcades. *Id.* at 829 n.9. The Fourth Circuit held that the health department report supported regulation of the secondary impact of adult arcades by prohibiting their operation in conjunction with another adult entertainment business.

Hart Book Stores, decided seven years before *Renton,* is inconsistent with controlling Ninth Circuit authority decided after *Renton.* The Ninth Circuit has required local governments to justify secondary effects regulations by showing that the conduct regulated actually produces the secondary effects that the government invokes to justify the regulation. *Acorn,* 887 F. 2d at 224. If, as here, the City justifies the regulation based on secondary effects produced by concentration of businesses, it must demonstrate that the conduct restricted relates to concentration. *Id.* It may not point to other secondary effects, such as unsanitary conditions within the businesses, that have nothing to do with the concentration of such businesses within a given area. The Court respectfully concludes that the Fourth Circuit in *Hart Book Stores* erred by treating testimony regarding unsanitary conditions inside a video arcade as related to secondary effects of concentration of adult entertainment businesses.

The City is correct in asserting that this case is like *Hart Book Stores.* There, as here, the government failed to demonstrate that the combination of adult entertainment

business in a single building is the equivalent of a concentration of separate adult businesses in a neighborhood. While such a failure passed constitutional muster in *Hart Book Stores,* it is fatal under the secondary effects doctrine as applied by the Ninth Circuit. Under *Acorn,* in order for the City to benefit from the content-neutral *Renton* analysis, the City must prove the existence of the specific secondary effects asserted in justifying the regulation as content neutral. *Acorn,* 887 F.2d at 224.

The 1977 studies on which the City relies to prove a substantial government interest demonstrate the need for a distance requirement for separate adult entertainment businesses. The planning department study did not address the secondary impact of single adult entertainment businesses.[7] Therefore, in order to justify the imposition of the distance requirement on the plaintiffs' bookstores and arcades, the City must demonstrate that the bookstore and arcade components are separate businesses, like those whose concentration was examined by the 1977 studies.

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[7] The planning department study's inapplicability to the question of whether a single adult entertainment business has harmful secondary effects is demonstrated by the study's method for selecting "control areas." By definition such areas did not have *concentrations* of adult businesses. Two of the five control areas, however, contained single adult businesses. (*See* 3 Def.'s RJN Ex. 5 at 380 (Hollywood Blvd. and Highland Ave. control area, Vermont Ave. and Santa Monica Blvd. control area). The City, therefore, cannot rely on the study to show harmful secondary effects of single adult entertainment businesses in the absence of concentration with other businesses.

The Court concludes that there is a genuine issue of fact as to whether the plaintiffs' bookstore and arcade operations are separate businesses. The issue for trial is whether the two components of the plaintiffs' stores create independent sets of secondary effects, which when concentrated at one location, lead to the adverse secondary impacts identified by the 1977 studies.

4. Reasonable Alternative Avenues of Communication

"To be reasonable, time, place and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication." *Schad*, 452 U.S. at 75-76. The burden is on the city to show that enforcement of its ordinance would leave adequate alternative channels. *See Phillips v. Borough of Keyport*, 107 F.3d 164, 177 (3d Cir. 1997). The City need not show that the alternative avenues are as economically advantageous to the plaintiffs as their current locations. *Topanga Press*, 989 F.2d at 1528-29. If the zoning ordinance leaves open alternative sites that are part of the relevant market – i.e., that are not under water or so remote from the municipal infrastructure as to be unusable for any commercial purpose – the government need not ensure access to such avenues at "bargain prices." *Id.* at 1589; *Renton*, 475 U.S. at 55. The Supreme Court has held the alternative sites need not be actually available, but only "potentially" available. *Id.* The Ninth Circuit has defined "potentially available" in this context to exclude property if "it is unreasonable to believe that

[the property] would ever become available to any commercial enterprise." *Topanga Press*, 989 F.2d at 1524.

The parties have not moved for summary adjudication of the alternative avenues issue. The Court notes that previous litigation on this ordinance indicates the presence of a genuine issue as to whether the ordinance provides sufficient alternative avenues. The court of appeals in *Topanga Press* found that the district court had not abused its discretion in finding that the adult entertainment zoning scheme did not leave sufficient potentially available relocation sites for the adult entertainment businesses now in violation of the multiple use ordinance. 989 F.2d at 1533. The court of appeals in *Topanga Press* held that the lack of relocation sites created a "serious question of law as to whether the City has left open alternative avenues "of expression." *Id.* at 1534.

D. Equal Protection

1. Selective Settlement

The plaintiffs claim they have been denied equal protection of the laws because the City has agreed not to enforce the ordinance against other adult bookstore operators in a series of stipulated permanent injunctions, but has sought to enforce it against the plaintiffs. The issue here is whether the equal protection clause requires the City to apply the terms of the settlements to the plaintiffs even though the plaintiffs were not parties to the settled cases. The plaintiffs argue that the City's conduct in settling the previous lawsuits and refusing to settle the instant case involves an arbitrary classification which

cannot withstand rational basis scrutiny under the standard of *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S. Ct. 3249 (1985). There, the Court applied the rational basis standard to invalidate the application of a zoning ordinance against a group home for the mentally retarded. The court held that the ordinance, as applied to the group home, treated the home differently than it treated similarly situated care facilities and multiple-unit buildings. *Id.* at 447, 105 S. Ct. at 3258. The Court rejected the municipality's argument that negative attitudes of property owners toward the mentally retarded provided a rational basis for the distinction. *Id.* at 448, 105 S. Ct. at 3259.

The plaintiffs' argument ignores the government's broad discretion to choose whom it prosecutes. *See Wayte v. United States,* 470 U.S. 598, 607, 105 S. Ct. 1524, 1530 (1985). The equal protection clause is not violated by a decision to forego prosecution of certain charges as result of a settlement agreement or plea bargain. *See Bordenkircher v. Hayes,* 434 U.S. 357, 98 S. Ct. 663 (1978). Absent an allegation of selectivity based on impermissible discrimination by race, gender or national origin, or on some other arbitrary basis, selective prosecution for the purpose of settling cases does not violate equal protection. *Id.* at 364, 98 S. Ct. at 668-69.

The plaintiffs' equal protection argument fails because their situation is not similar to that of the parties to the *Topanga Press, E.W.A.P.,* and *Diamond* cases. Those parties entered into settlement agreements with the City, while the present plaintiffs did not. That distinction satisfies the equal protection clause. Nor does the equal protection clause require the City to offer the present

plaintiffs the same settlement terms as offered to the previous plaintiffs, absent an impermissible reason for the distinction.[8]

In their reply memorandum, the plaintiffs rely on *United States v. Steele,* 461 F.2d 1148 (9th Cir. 1972). There, the Ninth Circuit held that the Census Bureau violated the equal protection clause by choosing to prosecute only vocal organizers of a census resistance movement for violations of a statute prohibiting refusal to answer census questions. *Id.* at 1152. The court of appeals held that the Census Bureau had singled out the plaintiffs for prosecution based on their exercise of their First Amendment right to speak out against the census. This case, however, is distinguishable. The plaintiffs here do not assert that they have been singled out from among other adult businesses based on the exercise of First Amendment rights. On the contrary, the exercise of the right to

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[8] The City also contends that the plaintiffs are not similarly situated with the previous litigants because some of the previous litigants had a colorable claim to "grandfather" status under the Ordinance. (Def. Opp. at 14.) The ordinance exempts multiple use establishments that were in business prior to September 1, 1978. LAMC § 12.70(E) (3). The City offers several declarations to establish that at the time of the settlements it had reason to believe that the previous litigants were entitled to grandfather status under the ordinance. (Declaration of James L. Bangham; Declaration of Peter Nelson King.) The plaintiffs have filed evidentiary objections to these declarations on hearsay and best evidence grounds. Because, however, the Court need not reach this argument in order to reject the Plaintiffs' equal protection claim, the Court need not consider these declarations, and therefore need not determine their admissibility for purposes of the present summary judgment motions.

free expression is what makes the plaintiffs similarly situated to the other adult entertainment businesses. The City has not used its prosecutorial discretion to distinguish between those businesses that engage in speech and those that do not. Rather, it distinguishes between those adult businesses that were parties to the previous suit, and the present plaintiffs, all of whom engage in the same form of protected expression. The "strong inference of discriminatory prosecution" that arose in *Steele* from the distinction based on expressive conduct does not apply in this case.

The Court therefore grants the City's motion for summary adjudication on the issue of whether the City's selective enforcement of the ordinance violates the Fourteenth Amendment.

2. Classification Based on Exercise of Fundamental Right

The plaintiffs contend that the multiple use ordinance treats them differently than other multiple use businesses – such as a Sears Roebuck with an attached automobile service department – based on the plaintiffs' exercise of First Amendment protected speech. The plaintiffs argue that the City's interest in ameliorating the harmful effects of the plaintiffs' purported separate adult entertainment uses are adequately served by the zoning regulations applicable to each use. Using the Sears example, if the Sears retail store and the Sears auto repair department were both allowed in a given zone, then the City would rely upon the zoning restrictions applicable to each use in order to protect the public, without requiring

Sears to close one of these operations. (Plaintiffs' EQP Motion at 13.) The plaintiffs assert that no other business is subject to multiple use restrictions added on top of the restrictions applicable to each single use. (*Id.* at 14.)

The Supreme Court has held that municipalities may use the content of sexually oriented entertainments as the basis for placing them in a different classification from other businesses. *Young*, 427 U.S. at 71. The same reasoning that supports the legal fiction that content-based regulations of adult entertainment to alleviate secondary effects is actually content-neutral under the First Amendment allows the distinction between adult and non-adult businesses to avoid strict scrutiny review under the Fourteenth Amendment. Because the *Renton* doctrine views such regulation as directed toward secondary effects rather than toward expressive conduct, no fundamental right is implicated. Thus, the classification in question is not between businesses that engage in protected expressive conduct and those that do not, but rather between businesses that cause harmful deleterious effects associated with adult entertainment and those that do not. For equal protection purposes, rational basis scrutiny applies. The City's policy to reduce the deleterious effects is a rational basis for the different treatment of adult entertainment businesses. Therefore, the plaintiffs' equal protection claim fails as a matter of law if the regulation is directed toward harmful secondary effects.

As indicated above in the First Amendment discussion, the Court finds that there is a genuine issue of fact as to whether the 1977 studies support the finding of harmful secondary effects from multiple adult entertainment uses within a single building. If the City fails to

meet its burden on this issue, then the ordinance must be examined as a content-based speech regulation under First Amendment strict scrutiny. Under that circumstance, the ordinance would also have to pass strict scrutiny under the Fourteenth Amendment as distinction based on exercise of a fundamental right.

The Court therefore denies both motions for summary adjudication on the issue of whether the ordinance violates the Fourteenth Amendment by treating persons differently based on the exercise of fundamental rights.

E. Due Process Vagueness and Overbreadth

1. Vagueness

The plaintiffs argue that in the event the Court rejects their facial challenge to the ordinance, they would not be able to conform their conduct to the requirements of the ordinance because it is unconstitutionally vague. (Plaintiffs' DP Motion at 2.) The plaintiffs contend that by defining an adult bookstore as an establishment which has adult materials "as a substantial portion of its stock-in-trade," the ordinance fails to provide fair notice of the conduct regulated. The plaintiffs contend that they cannot determine from the statute what ratio of adult to non-adult material would remove them from the scope of the ordinance. (*Id.*)

a. Standing and Ripeness

The City asserts that the plaintiffs do not have standing to assert vagueness because the plaintiffs have admitted that the ordinance applies to their businesses as

currently configured. (Complaint ¶ 84.) In *Young* and *Renton*, the Supreme court rejected similar vagueness claims on the grounds that the plaintiffs conceded that the ordinances clearly applied to them. *Young*, 427 U.S. at 59; *Renton*, 475 U.S. at 55 n.4. The Ninth Circuit has held that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Stoianoff v. State of Mont.*, 695 F.2d 1214, 1218 (9th Cir. 1983). Because there is no question as to the applicability of the ordinance to the plaintiffs, the Court rejects the vagueness challenge for lack of standing.

The plaintiffs argue that they will have standing if the preliminary injunction is lifted and they are faced with the task of bringing their businesses into compliance with the ordinance, or bringing their businesses out from under the definition of "adult entertainment." The fact that the plaintiffs have these choices in the event that they lose this lawsuit demonstrates that their vagueness challenge under this theory is not ripe for judicial resolution.

b. Merits

A statute is not impermissibly vague if it defines the offense with sufficient definiteness that ordinary people can understand what is prohibited, and it establishes standards to permit enforcement the law in a non-arbitrary, non-discriminatory manner. *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997). The plaintiffs cite declarations of zoning officers, made in the *Topanga Press* case, in which the officers testified that they did not

apply a numerical formula to determine when a portion of adult material was "substantial." (Garrou Decl. Exs. A, B and C.) The gist of these declarations is that the officers know an adult business when they see one.

There is no Ninth Circuit authority for the proposition that a zoning ordinance that requires case-by-case construction of a term like "substantial portion" is impermissibly vague. On the contrary, the Ninth Circuit in *Stoianoff* held that a drug paraphernalia statute was not impermissibly vague merely because its application depended on case-by-case determination of whether a particular item was "designed for use" as drug paraphernalia. 695 F.2d at 1220. "A definition which casts a wide net is necessary to accomplish the objectives of this Act." *Id.; see also Lydo Enterprises, Inc. v. City of Las Vegas,* 745 F.2d 1211, 1215 (9th Cir. 1984) (rejecting vagueness argument based on lack of " 'quantitative modifiers' " indicating what amount of adult material brings business within coverage of adult entertainment zoning statute).

Furthermore, the California courts have adopted a limiting construction of the "substantial portion" language. *Lucero,* 49 Cal. 3d 14, 259 Cal. Rptr. 740. In *Lucero,* the California Supreme Court rejected the California court of appeal's construction of the language to include a preponderance standard under which a use would not be covered unless the stock in trade of the business included more than 50% adult material. *Id.* at 741 (overruling *Pringle,* 115 Cal. App. 3d 151, 171 Cal. Rptr. 251). In place of the *Pringle* preponderance standard the court adopted " 'the regular and substantial course of conduct' standard." *Lucero,* 49 Cal. 3d at 19. Under the standard as applied to the adult theaters at issue in *Lucero,* the zoning

restrictions would "apply to all adult entertainment theaters offering adult fare as a substantial part of their regular business, but would not apply to theaters showing only occasional or incidental adult movies." *Id.* at 28.

The regular and substantial course of conduct standard can be applied to both the arcade and bookstore portions of the plaintiffs' businesses. The City argues that the zoning officials' declarations offered by the plaintiffs demonstrate that these officials have applied the regular and substantial conduct test in determining whether a business meets the ordinance's definition of adult entertainment. (Def. Opp. at 31.) Zoning official Eberhard testified that after the *Lucero* decision the department applied a number of objective factors: "One of the objective factors might be the amount of material available for sale. Another objective factor would be the placement and display of those materials. Another objective factor might be whether or not the establishment – how it represents itself in terms of advertising signs, or pieces of information." (*Id.* Ex. 26.) Based on this testimony, the Court concludes that the City has applied the *Lucero* standard to limit the meaning of "substantial portion" so that the language is not unconstitutionally vague.

2. Overbreadth

Overbreadth doctrine allows a person to whom a statute may be constitutionally applied to challenge the statute on the basis that it may unconstitutionally chill speech by others. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 411, 112 S. Ct. 2538, 2558 (1992) (White, J., concurring). Overbreadth doctrine is " 'strong medicine' " and should

not be applied unless the statute sweeps in a substantial amount of protected speech and is not susceptible to a limiting construction. *Id.*

The plaintiffs, however, have not properly raised an overbreadth issue. The plaintiffs argue that the statute is overbroad because it chills multiple uses for which the City does not have proper evidence of deleterious effects. This is not an overbreadth argument, but rather a restatement of the plaintiffs' time, place and manner argument that the ordinance is not justificable as a content-neutral regulation of speech. Overbreadth doctrine should not be applied when a case can be decided on narrower grounds. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973) (noting that overbreadth doctrine is to be applied "sparingly and only as a last resort"). Because the court finds a genuine issue as to whether the ordinance serves a substantial government interest under the secondary effects doctrine, the Court need not analyze this ordinance for overbreadth. The ordinance's chilling effect on multiple uses is not a result of overbreadth. Multiple uses are the precise targets of the ordinance. The question in this case is whether this precise targeting is constitutional under the secondary effects doctrine.

The arguments which the plaintiffs mischaracterize as arising under the overbreadth doctrine should therefore be decided only as part of the time, place and manner analysis.

V. Conclusion

A. Abstention

Because there is no judicial proceeding pending against Alameda or Highland, the Court need not abstain on *Younger* grounds.

The court need not defer or stay the action under *Pullman* because the lawsuit involves a First Amendment issue which does not normally lend itself to *Pullman* abstention, and because there is no issue of state law whose resolution might make it unnecessary to reach the constitutional issues in this case.

Because no administrative or regulatory scheme is at stake in this case, the Court need not dismiss on grounds of *Burford* abstention.

B. Statute of Limitations

As to the issue of the statute of limitations, the Court denies the City's motion for summary judgment because the plaintiffs' alleged injuries arise out of continuing violations of their first Amendment rights, and therefore cannot be said to have accrued with the enactment of the multiple use amendment in 1983.

C. First Amendment

There remains a genuine issue of fact as to whether the combination bookstore/arcade is a single adult entertainment business, or whether the bookstore/arcade represents a "concentration" of separate adult entertainment uses whose secondary effects may be demonstrated by

the 1977 studies. Therefore, both motions for summary adjudication are denied as to the validity of the ordinance as a purportedly content-neutral regulation of secondary effects under *Renton* and *Young*.

1. Alternative Avenues of Communication

There remains a genuine issue of material fact as to whether the zoning scheme leaves open alternative channels of communication for either the bookstore or arcade uses.

D. Equal Protection

1. Selective Prosecution

The City has demonstrated that there is no genuine issue of fact as to whether the selective settlement policy violates equal protection. As a matter of law, the City may chose [sic] to settle some cases and prosecute others. The City's motion for partial adjudication is granted as to the selective prosecution equal protection violation.

2. Fundamental Rights

Because there remains a triable issue of fact as to whether the ordinance is a valid secondary effects regulation, there also remains a triable issue as to whether the ordinance violates equal protection based on exercise of a fundamental right. Therefore both motions for summary adjudication are denied as to this claim.

E. Due Process

1. Vagueness

Because the plaintiffs admit that the statute applies to them, there is no triable issue as to vagueness. The City's motion for summary adjudication is granted as to the vagueness issue.

2. Overbreadth

Because the plaintiffs' overbreadth argument is based not on the chilling effect of the ordinance on those not covered by its provisions, but rather on those covered, the Court need not reach the overbreadth question. Resolution of the First Amendment issues in the case will dispose of the overbreadth issue. Therefore, the Court grants the City's motion for summary adjudication of the overbreadth claims.

VI. Issues Remaining For Trial Or Future Motions

The Court's Standing Order requires the parties to prepare a joint proposed pre-trial conference order setting forth the issues remaining for trial. The court notes that the following issues have survived summary judgment:

1. Are the bookstore and arcade components of Alameda Books and Highland Books separate adult entertainment uses such that their "concentration" in a single building can be expected to cause the harmful secondary effects identified in the 1977 study?

2. Does the zoning scheme leave open reasonable alternative relocation sites for the adult entertainment uses displaced by the multiple use ordinance, or does the scheme have the effect of prohibiting either adult video arcades or adult bookstores throughout the City?

IT IS SO ORDERED.

Dated: 1-8-98

/s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

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